***United States Court of Appeals***

***for the***

***District of Columbia Circuit***

# TRANSCRIPT OF RECORD

**BRIEF FOR APPELLANT**

IN THE

# UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 12,958





JOHN S. SERVICE,
*Appellant,*

v.

John Foster Dulles ~~[illegible]~~, ET AL.,
*Appellees.*

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**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA**

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No. 12,958

## QUESTIONS PRESENTED

1. Whether the Secretary of State, purporting to exercise his authority under the President's Loyalty Executive Order 9835 *and also* under the McCarran Rider, lawfully dismissed appellant from the Foreign Service of the United States when the dismissal was, as is now admitted, unlawful as an exercise of the Secretary's authority under Executive Order 9835?

2. Whether appellant's dismissal was a valid exercise of the Secretary of State's absolute discretion under the McCarran Rider when it was effected in violation of the regulations promulgated by the Secretary to govern exercises of his authority under that Rider?

3. Whether appellant's dismissal was arbitrary and in violation of the 5th Amendment when the Secretary of State dismissed him "solely" on the basis of the "lawless" action of the Loyalty Review Board and without making any independent judgment of his own on the record in this case?

4. Whether the records of the State Department as well as those of the Civil Service Commission should be expunged of material defamatory to appellant?

# TABLE OF CONTENTS


| | Page |
|---|---|
| JURISDICTIONAL STATEMENT | 1 |
| STATEMENT OF THE CASE | 2 |
| STATUTES INVOLVED | 5 |
| STATEMENT OF POINTS | 5 |
| SUMMARY OF ARGUMENT | 6 |
| ARGUMENT | 7 |
| I. APPELLANT SHOULD BE RESTORED TO HIS POSITION AS A FOREIGN SERVICE OFFICER BECAUSE HE WAS ILLEGALLY DISCHARGED | 7 |
| A. APPELLANT'S DISMISSAL WAS UNLAWFUL BECAUSE IT WAS EFFECTED IN VIOLATION OF EXECUTIVE ORDER 9835, AS AMENDED, AND VALID REGULATIONS ISSUED THEREUNDER | 7 |
| 1. The Grounds Upon Which the Secretary of State Acted In Dismissing Appellant | 9 |
| a. The authority invoked by the formal charges preferred against appellant on March 24, 1950 | 10 |
| b. The authority invoked by the Secretary of State in his public statement of December 13, 1951 at the time he discharged appellant | 11 |
| c. The authority invoked by the Secretary of State in his affidavit of January 19, 1953 | 13 |
| 2. The Respects In Which Appellant's Dismissal Violated Executive Order 9835, As Amended | 17 |
| a. The Secretary of State acted solely on the basis of the Loyalty Review Board opinion which was illegal | 18 |
| b. The Secretary of State made no independent determination on all the evidence that there was a reasonable doubt of appellant's loyalty | 20 |
| B. APART FROM EXECUTIVE ORDER 9835, APPELLANT'S DISMISSAL WAS NOT VALIDATED BY THE McCARRAN RIDER | 21 |
| 1. The History of the McCarran Rider | 21 |
| 2. The Secretary of State Dismissed Appellant in Violation of His Own Regulations Governoring Dismissals Under the McCarran Rider Power | 23 |

Page

a. The Regulations and Procedures of March 11, 1949.... 25
(i) Section 391.3 ..... 25
(ii) Section 395.1 ..... 26
b. The Regulations and Procedures, as amended through September 21, 1951..... 26
(i) Section 391.3 ..... 26
(ii) Section 393.1 ..... 27
(iii) Section 395.1 ..... 29
c. The Government's defensive arguments concerning the Secretary's Regulations..... 29
(i) The applicability of the Secretary's Regulations to exercises of McCarran Rider authority..... 30
(ii) The Secretary's Regulations as mere policy statements ..... 31
(iii) The validity of the Secretary's Regulations under the McCarran Rider..... 31
3. Appellant's Discharge Was An Arbitrary and Unlawful Exercise of the Secretary's Discretion under the McCarran Rider ..... 35

II. THE DISTRICT COURT ERRED IN FAILING TO ORDER THE SECRETARY OF STATE TO EXPUNGE FROM THE RECORDS OF THE DEPARTMENT OF STATE ALL MATERIAL SUGGESTING THAT THERE IS ANY REASONABLE DOUBT OF APPELLANT'S LOYALTY..... 38

CONCLUSION ..... 39

*CITATIONS*

*Cases:*

Accardi v. Shaughnessy, 347 U.S. 260..... 24, 34, 37
Arenas v. United States, 322 U.S. 419..... 16, 36
Burrell v. Martin, App. D.C. , F.(2d , No. 12376, Oct. Term 1955, decided Nov. 10, 1955..... 9
Cook Chocolate Co. v. Miller, 72 F. Supp. 573 (DC, DC)..... 36
Hammond v. Hull, 131 F.(2d) 23 (App D.C. 1937), cert. den. 318 U.S. 777 ..... 15
Kutcher v. Gray, 91 App. D.C. 266, 199 F.(2d) 783,787..... 18, 20, 29
Mastrapasqua v. Shaughnessy, 180 F.(2d) 999 (CA 2)..... 36
Morgan v. United States, 304 U.S. 1, 17-18..... 29
N.L.R.B. v. Capital Transit Co., App. D.C. , 221 F.(2d) 864 9
Pagano v. Brownell, App. D.C. , F.(2d) , No. 12130 Oct. Term 1955, decided Oct. 13, 1955..... 16, 36
Perkins v. Elg, 307 U.S. 325..... 16, 17, 36
Peters v. Hobby, 349 U.S. 331..... 3, 4, 6, 7, 12, 18
Pierce v. United States, 98 Ct. Cl. 28..... 15
Rudder v. United States, App. D.C. , F.(2d) , No.

Page

12313 Oct. Term 1955, decided July 21, 1955 ..... 16, 35
Securities and Exchange Commission v. Chenery Corp., 318 U.S. 80, 87 ..... 6, 9, 16
Sheridan-Wyoming Coal Co. v. Krug, 83 App. D.C. 162, 172 F.(2d) 282, 287 ..... 24
Wendell v. Spencer, App. D.C. , 217 F.(2d) 858 ..... 16, 36

*Statutes:*

22 U.S.C. §§1007, 1008, 826, 637, 638, 211 (Foreign Service Act of 1946) ..... 9, 14, 15
Public Law 490, 79th Cong., 2d Sess., Department of State Appropriation Act, 1947, enacted July 5, 1946 (60 Stat. 458) ..... 22
Public Law 166, 80th Cong. 1st Sess., Department of State Appropriation Act, 1948, enacted July 9, 1947 (61 Stat. 288) ..... 22
Public Law 597, §104, 80th Cong., 2d Sess., Department of State Appropriation Act, 1949, enacted June 3, 1948 (62 Stat. 315) ..... 22
Public Law 179, §104, 81st Cong., 2d Sess., Department of State Appropriation Act, 1950, enacted July 20, 1949 (63 Stat. 456) 10, 22, 24
Public Law 733, 81st Cong., 2d Sess., enacted Aug. 26, 1950, 64 Stat. 476, 5 U.S.C.A. §22 et seg. ..... 15, 27, 30
General Appropriations Act, 1951, §1213, Public Law 759, 81st Cong. 2d Sess., enacted September 6, 1950 (64 Stat. 609) ..... 22, 27, 34
Public Law 188, §103, 82nd Cong., 1st Sess., Department of State Appropriation Act, 1952, enacted October 22, 1951 (65 Stat. 581) ..... 7, 13, 21, 23, 31, 32
Public Law 495, §103, 82d Cong., 2d Sess., Department of State Appropriation Act, 1953, enacted July 10, 1952 (66 Stat. 555) ..... 23

*Miscellaneous:*

Acheson, Dean, A Democrat Looks at His Party, Harper & Brothers, New York, New York ..... 38
Code of Federal Regulations, Ti. 5, §220.4 ..... 12
Executive Order 9835, 12 F.R. 1935 ..... 3, passim.
Executive Order 10241, 16 F.R. 3690 ..... 3, 4, 13
House Bill 6056, 79th Congress, 2nd Session ..... 32
Regulations and Procedures, Department of State, March 11, 1949 ..... 2, 10, 11, 24, 25, 26, 30
Regulations and Procedures, Department of State, September 21, 1951 ..... 24, 26, 27, 28

In The

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John S. Service,
*Appellant,*

v.

Hiram Bingham, Et Al.,
*Appellees.*

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## BRIEF FOR APPELLANT

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### JURISDICTIONAL STATEMENT

On appellant's motion and appellees' cross-motion for summary judgment, the District Court, while granting a portion of the relief sought by appellant, denied his motion for summary judgment and granted appellees' cross-motion (J.A. 90). This appeal is from those portions of the Court's order which (1) denied appellant's claim to reinstatement to his former position as a Foreign Service Officer, and (2) failed to order the Secretary of State to expunge from the records of the State Department material defamatory to appellant. Jurisdiction of this Court is founded on 28 U.S.C. § 1291.

## STATEMENT OF THE CASE

On March 24, 1950, the Secretary of State initiated proceedings against appellant which ultimately resulted in his dismissal from his position as a Foreign Service Officer of the United States on December 13, 1951. These proceedings were commenced by a letter directed to appellant by the Chairman of the Department of State Loyalty Security Board preferring certain charges against him. The letter inclosed a copy of the Regulations promulgated on March 11, 1949, "setting forth the revised loyalty and security principles and procedures relating to employees of the Department of State" (J.A. 29), stated specific charges[1] against appellant under these regulations and advised him that a hearing would be held before the Departmental Loyalty Security Board under these regulations to consider the charges with a view to making recommendations to the Secretary of State whether, under the so-called McCarran Rider, appellant's employment in the Department should be terminated in the interest of the United States (J.A. 29-30).

After exhaustive hearings from May 26, 1950 through June 24, 1950, the Loyalty Security Board on October 24, 1950 found and concluded on the basis of all the evidence (1) that reasonable grounds did not exist for the belief that appellant was disloyal to the United States and (2) that he did not constitute a security risk to the Department of State (J.A. 28).

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[1] "The specific charges are that within the meaning of Section 392.2f of Regulations and Procedures of the Department of State, you are a member of, or in sympathetic association with, the Communist Party which has been designated by the Attorney General as an organization which seeks to alter the form of government of the United States by unconstitutional means; and further that within the meaning of Section 393.1d of said Regulations and Procedures you are a person who has habitual or close association with persons known or believed to be in the category set forth in Section 393.1a of said Regulations and Procedures to an extent which would justify the conclusion that you might through such association, voluntarily or involuntarily, divulge classified information without authority."

These findings and conclusions were accepted and confirmed on or about December 6, 1950 by the Deputy Under Secretary of State, acting for the Secretary of State (J.A. 42-43, 63).

After the issuance of Executive Order 10241, 16 F.R. 3690, on April 28, 1951, amending the standard previously established by Executive Order 9835, 12 F.R. 1935, for removal from employment on loyalty grounds, the Loyalty Security Board again considered appellant's case under the new and stricter standards and on July 31, 1951 "determined that no reasonable doubt exists as to his loyalty to the United States" (J.A. 28).

This finding was similarly accepted and confirmed by the Deputy Under Secretary of State, acting for the Secretary (J.A. 42-43, 63).

Thereafter, the Loyalty Review Board, an agency established within the Civil Service Commission by Executive Order 9835, acting on its own initiative, assumed jurisdiction of appellant's case, held a hearing and on December 13, 1951, purported to reverse the favorable findings of the Secretary of State and his Loyalty Security Board as to whether there was a reasonable doubt of appellant's loyalty to the United States (J.A. 11). The Loyalty Review Board admittedly had no jurisdiction over questions as to whether appellant was a "security risk" and its decision did not purport to disturb the favorable findings of the Secretary of State on this question.

The Loyalty Review Board's purported "reversal" of the State Department's findings was itself unlawful and invalid for numerous reasons. Among these (all of which were advanced in the court below) was the fact that the Loyalty Review Board was wholly without jurisdiction under Executive Order 9835 to reverse the findings of the State Department Loyalty Security Board and of the Secretary of State which were favorable to appellant, *Peters* v. *Hobby*, 349 U.S. 331. The Government conceded this

below, the District Court so held, and its order in this respect is not now challenged.

On December 13, 1951, upon receipt of notice from the Loyalty Review Board of its action, appellant and his counsel sought an opportunity to appeal to the Secretary of State from the unlawful action of the Loyalty Review Board. But this opportunity was denied appellant who was advised that the Secretary had already determined to discharge appellant, and had notified the press to be prepared to receive a press release announcing this fact (J.A. 72).

After fruitless appeals to the Loyalty Review Board for vacation and reconsideration of its decision and to the Civil Service Commission appellant commenced this action in the District Court on November 2, 1951, seeking an order (1) directing his reinstatement to his former position and reimbursement of back pay in the amount of the difference between his salary and his interim earnings, and (2) directing that all Government records be expunged of the defamatory material uttered by the Loyalty Review Board and the Secretary of State concerning appellant's doubtful loyalty.

The case was heard below on cross motions for summary judgment on the basis of the Third Amended Complaint, Answer, appellees' admissions and affidavits of appellant and affidavits supplied by appellees.

On the authority of *Peters* v. *Hobby, supra,* decided by the Supreme Court on the day before oral argument of this case, Judge Curran directed the Civil Service Commission—but not the Secretary of State—to expunge its records of the finding of the Loyalty Review Board as to appellant's doubtful loyalty, but declined to order appellant's reinstatement as a Foreign Service Officer for reasons which will be discussed in the course of the argument below. This appeal challenges (1) the District Court's failure to direct appellee Secretary of State to reinstate appellant with back pay and (2) the District Court's failure to direct the

Secretary of State to expunge from the records of the State Department, all defamatory matter concerning the doubtfulness of appellant's loyalty to the United States.

## STATUTES INVOLVED

The principal statute involved is the so-called McCarran Rider to the various State Department Appropriation Acts. The text and history of this rider is set out below, pp. 21-23.

Also involved is Executive Order 9835 (12 F.R. 1935), as amended by Executive Order 10241 (16 F.R. 3690). These Executive Orders established and governed the so-called President's Loyalty Program. They have both now been rescinded.

## STATEMENT OF POINTS

1. The District Court erred in holding that appellant's discharge from the Foreign Service was valid even though admittedly unlawful as an exercise of the Secretary of State's authority under Executive Order 9835, as amended.

2. The District Court erred in holding that appellant's discharge was a valid independent exercise of the Secretary of State's authority under the McCarran Rider.

(a) Appellant's discharge violated the Secretary of State's own regulations validly promulgated to govern exercises of his discretionary authority under the McCarran Rider.

(b) Appellant's discharge violated the 5th Amendment to the Constitution in that it was an arbitrary and unreasonable exercise of the Secretary's absolute discretion.

3. The District Court erred in failing to order the Secretary of State to expunge from the records of the State Department all material suggesting that there was a reason-

able doubt as to appellant's loyalty to the government of the United States.

## SUMMARY OF ARGUMENT

I. Appellant will show that he is entitled to be restored to his former position as a Foreign Service Officer because the Secretary of State illegally discharged him from his position in disregard of the express provisions of the Foreign Service Act of 1946 and that neither of the sources of authority invoked by the Secretary suffices to sustain his discharge. The record shows that the Secretary purported to discharge appellant in the exercise of his authority under *both* the Loyalty Executive Order 9835 *and* the McCarran Rider; but the discharge violated Executive Order 9835 in numerous respects, e.g., *Peters* v. *Hobby*, 349 U. S. 331; hence the discharge was unlawful because the Secretary's action must be sustainable on the grounds which he invoked to support it. *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80, 87. Alternatively, appellant will show that his discharge was invalid as an exercise of the Secretary's McCarran Rider authority even when considered in isolation as though it purported to be an exercise of that power alone. By relying "solely" on the invalid finding of the Loyalty Review Board and failing to make an independent determination on all the evidence and by denying appellant an opportunity to appeal to him, the Secretary violated his own regulations prescribing the manner in which he would exercise his McCarran Rider authority and thereby denied appellant the procedural and substantive guarantees of these regulations. Finally, appellant will show that apart from the violation of his own regulations governing the exercise of his McCarran Rider authority, the Secretary exercised his discretion under the McCarran Rider, if at all, in an arbitrary and illegal manner in that he misapprehended the legal validity of the Loyalty Review Board finding on which he

relied "solely" and in that he failed to make an independent determination of his own that appellant's discharge was necessary or advisable in the interests of the United States. Therefore, appellant should be restored to his position.

II. Apart from the legality of his discharge, appellant will further argue that the District Court failed to issue a sufficiently broad order directing the expunging of material defamatory to appellant from all government records, including, particularly, those of the Department of State. *Peters* v. *Hobby, supra.*

## ARGUMENT

### I. APPELLANT SHOULD BE RESTORED TO HIS POSITION AS A FOREIGN SERVICE OFFICER BECAUSE HE WAS ILLEGALLY DISCHARGED.

#### A. Appellant's Dismissal Was Unlawful Because It Was Effected in Violation of Executive Order 9835, as Amended, and Valid Regulations Issued Thereunder.

The District Court accepted the Government's contention that the validity of appellant's dismissal by the Secretary of State must be judged by reference to two independent or alternative standards: the President's Loyalty Order, Executive Order 9835, as amended, or, alternatively, the so-called McCarran Rider which, during the fiscal year of appellant's discharge, was embodied in § 103 of Public Law 188, 82d Congress, 1st Session (65 Stat. 581).[2]

*Peters* v. *Hobby, et al.*, 349 U. S. 331, was decided by the Supreme Court on the day before oral argument of this case in the District Court. The Loyalty Review Board in this case, as in the *Peters* case, had undertaken on its own initiative to reverse the findings of the head of an agency favorable to an employee. Since the Supreme Court held this to be an act of "administrative lawlessness" [3] wholly be-

[2] The history of the McCarran Rider is discussed in detail below, pp. 21-23.

[3] 349 U. S. at p. 345.

yond the jurisdiction of the Loyalty Review Board, the Government conceded in this case, and the District Court held, that the Loyalty Review Board's action unfavorable to appellant was invalid and that the Secretary of State's subsequent dismissal of appellant "solely" on the basis of the Loyalty Review Board's opinion (J.A. 82) was not valid under the Loyalty Executive Order.

But, the Government argued and Judge Curran held, that although when considered as an action under the Loyalty Program appellant's dismissal was unlawful, that action should be judged without regard to whether the Secretary of State purported to act under the Loyalty Program and is to be sustained if, viewed in isolation, the discharge may be said to constitute an exercise of the "absolute discretion" conferred on the Secretary by the McCarran Rider.

According to this argument, the Secretary was not required by the McCarran Rider to accord appellant any procedural or substantive rights; he could have dismissed appellant from the Foreign Service out of hand. Consequently, the whole procedure by which the Secretary of State, through his Loyalty Security Board, purported to prefer specific "loyalty" and "security risk" charges against appellant under Executive Order 9835; purported to try him on these charges under Regulations and Procedures of the Secretary of State which were furnished to appellant; represented that he would determine whether appellant's discharge was advisable in the interests of the United States according to whether, on all the evidence, there was a reasonable doubt of appellant's loyalty or whether he was a security risk; purported to give him some 58 hours of "hearings" on the charges; and purported to reach decisions on the evidence which were favorable to appellant both as to "loyalty" and as to "security risk"—all this was an elaborate hoax; for in the last analysis, the Secretary of State was free to reverse himself without re-

gard to the evidence or to his procedural "guarantees" and he did so do, discharging appellant in an exercise of his "absolute discretion."

If this argument were supported by fact it seems fair to say that a new low in public morals would have been achieved. But the fact is that from beginning to end of these proceedings, the Secretary of State never *purported* to do this. It is not necessary to argue here whether the Secretary of State might lawfully have thus kept the word of promise to the ear but broken it to the hope, *Cf. Burrell* v. Martin, App. D. C. , , F. (2d) , No. 12376, October Term, 1955, decided November 10, 1955. For the fact is that he purported to act on quite different grounds, as the record plainly shows. The validity of his dismissal of appellant must be determined by reference to grounds upon which the Secretary purported to act. "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80, at p. 87; *N.L.R.B.* v. *Capital Transit Co.*, App. D. C. , 221 F. (2d) 864.

## 1. The Grounds Upon Which the Secretary of State Acted in Dismissing Appellant.

We here show that throughout his proceedings against appellant, the Secretary of State purported to exercise his authority under Executive Order 9835 and that the reason why he relied *also* on the authority of the McCarran Rider was that it was necessary to invoke that statutory authority in order to discharge a Foreign Service Officer without observance of the procedural requirements of the Foreign Service Act of 1946, as amended (22 U.S.C. §§ 1107, 1002, 826).

a. The Authority Invoked by the Formal Charges Preferred Against Appellant on March 24, 1950.

The first step in the proceedings was, of course, the formal charges preferred against appellant on March 24, 1950 (J.A. 28). These charges, signed by the Chairman of the departmental Loyalty Security Board "for the Secretary of State" advised appellant of "Executive Order 9835 prescribing procedures for the administration of an Employee Loyalty Program," furnished appellant a copy of regulations and procedures promulgated March 11, 1949, "* * * setting forth the revised loyalty and security principles and procedures relating to employees of the Department of State," preferred specific charges within the meaning of these Regulations and Procedures and stated that a hearing had been scheduled under § 395 of these Regulations and Procedures, "* * * in order to consider this charge, with a view to making a recommendation to the Secretary of State whether or not, under the provisions of the Department of State Appropriation Act, 1950, Section 104, Public Law 179, 81st Congress, 1st Session,[4] your employment in the Department should be terminated *in the interest of the United States.*" The italicized language is the language of the McCarran Rider.

In short, at the outset of the proceedings, the Secretary of State told appellant that whether or not he would be dismissed under the statutory authority of the McCarran Rider "in the interests of the United States" would be determined by reference to the standards and procedures of the Loyalty Executive Order and the Secretary's Regulations and Procedures issued thereunder.

If there were any doubt as to this, the Regulations and Procedures, promulgated on March 11, 1949, a copy of

[4] This is the McCarran Rider. See below pp. 21-23, concerning the history of this Rider.

which was furnished appellant,[5] made the matter unmistakably clear. Section 391.2 of these Regulations states that so far as it relates to the handling of loyalty cases, they are promulgated in accordance with Executive Order 9835 and the regulations and directives of the Loyalty Review Board. Section 391.3 then provides:

> "391.3. In addition, the Secretary of State has been granted by the Congress the right, in his absolute discretion, to terminate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interests of the United States.[6] *In the exercise of this right, the Department will, so far as possible, afford its employees the same protection as those provided under the Loyalty Program.*" (Italics supplied.)

b. The Authority Invoked by the Secretary of State in His Public Statement of December 13, 1951, at the Time He Discharged Appellant.

The Secretary's public statement on December 13, 1951, as to the ground of his action in dismissing appellant on that day confirms that he purported to discharge appellant under the Loyalty Program. On that day he issued a press release and simultaneously published the opinion of his own Loyalty Security Board (J.A. 12-28) and the opinion of the Loyalty Review Board (J.A. 1-11) concerning appellant. In his press release (J.A. 35-37) the Secretary stated, *inter alia:*

> "* * * the Loyalty Review Board of the Civil Service Commission has advised the Department that this Board has found a reasonable doubt as to the loyalty of John Stewart Service. * * *

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[5] These Regulations and later amendments were never published in the Federal Register. They are not distributed to all employees of the Department. The March 11, 1949, regulations furnished appellant with the formal charges is the only version which ever came to his attention until during the course of these proceedings in the District Court.

[6] This language is a verbatim quotation from the McCarran Rider. See below, p. 22.

"Today's decision * * * is based on the evidence which was considered by the Department's Board and found to be insufficient on which to base a finding of 'reasonable doubt.' * * *

* * * * * * * * *

"'* * * On this point the State Department Board was *reversed.*

"The Chairman of the Loyalty Review Board has requested the Secretary of State to advise the Board of the effective date of the separation of Mr. Service. This request stems from the provisions of Executive Orders 9835 and 10241 * * * and the Regulations promulgated thereon. *These Regulations are binding on the Department of State.*

"The Department has advised the Chairman of the Loyalty Review Board that Mr. Service's employment has been terminated." (Italics supplied.)

Here there is no suggestion that the Secretary is switching horses after the race is run; no suggestion that quite independently of the Loyalty Program he is discharging appellant in an unrelated exercise of his absolute discretion under the McCarran Rider. On the contrary, he recognizes that his own Board has been "reversed" and that the request of the Chairman of the Loyalty Review Board to be advised of the effective date of his dismissal of appellant stems from the Loyalty Review Board regulations which are "binding on the State Department."

In this statement—a part of the *res gestae,* as it were—the Secretary undoubtedly states accurately the grounds for his action. He was attempting to do what was expected of him under the President's Loyalty Program. There is every reason to believe that he was faithfully responding to the Loyalty Review Board's directive of December 17, 1948, entitled, "Legal Effect of Advisory Recommendations," 5 C.F.R. § 220.4, quoted by Chief Justice Warren in *Peters, supra,* 349 U. S. at p. 348, footnote 25. This directive, after referring to the President's expectation of uniform application of loyalty policies, procedures and stand-

ards and to the mandatory effect of the Civil Service Commission's recommendations in certain Veteran's Preference cases, announces that "* * * it is necessary that the head of an agency follow the recommendation of the Loyalty Review Board in all cases."

c. The Authority Invoked by the Secretary of State in His Affidavit of January 19, 1953.

The remaining factual source as to the actual grounds upon which the Secretary of State acted in dismissing appellant is his own affidavit, dated January 19, 1953, the day before he left office, supplied to the Government after these judicial proceedings were commenced. In this, too, he avows that he was exercising his authority under Executive Order 9835 and the McCarran Rider, as well. He states that upon receipt of the letter from the Chairman of the Loyalty Review Board announcing that Board's doubt of appellant's loyalty (J.A. 82):

> "3. * * * I considered what action should be taken in the light of the opinion of the Loyalty Review Board, *recognizing that whatever action taken would be of utmost importance to the administration of the Government Employees Loyalty Program.* I understood that the responsibility was vested in me to make the necessary determination *under both* Executive Order 9835, as amended, *and under* Section 103 of Public Law 188, 82d Congress, as to what action to take.
>
> "4. Acting in the exercise of the authority vested in me as Secretary of State by Executive Order 9835, as amended by Executive Order 10241, *and also* by Section 103 of Public Law 188, 82d Congress (65 Stat. 575, 581), I made a determination to terminate the services of Mr. Service. * * *" (Italics supplied.)

With unmistakable clarity he tells us that he was undertaking to exercise his authority under Executive Order 9835 *and also* the McCarran Rider.

Indeed, if he did not purport to act under the authority of Executive Order 9835, why would he have recognized that

"whatever action taken would be of utmost importance to the administration of the Government Employees Loyalty Program"?

Now, it may be asked, why did he also invoke the authority of the McCarran Rider in support of his action.[7] The reasons for this are easy to find. In the first place, as the original letter of charges of March 24, 1950, plainly revealed, the whole announced theory of the proceeding against appellant was that the Secretary would deem it "in the interests of the United States" to dismiss appellant only if charges against him under the loyalty and security program were validly sustained. Beyond this, if appellant were to be dismissed under the Loyalty Program, the supplemental statutory authority of the McCarran Rider was absolutely necessary as a matter of law in the case of the proposed dismissal of a Foreign Service Officer by the Secretary of State.

Appellant was a Foreign Service Officer of the United States. As such he was entitled to the protection of the provisions of the Foreign Service Act of 1946, as amended, which contains specific provisions governing the separation of Foreign Service Officers by the Secretary of State. Sections 637 and 638 (22 U.S.C. §§ 1007 and 1008) govern separation "for unsatisfactory performance of duty" and "for misconduct or malfeasance," respectively. Both sections authorize the Secretary of State to separate officers but both provide:

> "* * * but no such officer shall be so separated until he shall have been granted a hearing by the Board of the Foreign Service. * * *"

and the officer's unsatisfactory performance of duty or his

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[7] Actually, this affidavit was not the first occasion of its invocation. It was invoked in the formal letter of charges dated March 24, 1950 (J.A. 29), in the letter of December 13, 1951, terminating appellant's employment (J.A. 75-76) and in the Department's own record of personnel action (J.A. 84). In all these cases, as in the Secretary's affidavit, *both* authorities were adduced.

misconduct has been established at that hearing. *Cf., Hammond* v. *Hull,* 131 F. (2d) 23 (App. D. C. 1937), *cert. den.* 318 U. S. 777; *Pierce* v. *United States,* 98 Ct. Cl. 28.

The Board of the Foreign Service is a special statutory board created by § 211 of the Foreign Service Act (22 U.S.C. § 826). Appellant never had a hearing before this Board (J.A. 71). Consequently, he could not in any circumstances have been validly discharged in the absence of some overriding legal authority for doing so.

Executive Order 9835 did not constitute any such overriding legal authority. In the first place it was a mere executive order, which cannot override a statute. In the second place, it did not in terms even purport to provide the legal authority for any head of a department to discharge anyone. It purported to do no more than establish new executive standards for effecting discharges under whatever independent legal authority existed for such discharges.[8]

In the Court below, the Government argued that Executive Order 9835 must be regarded as an exercise of whatever independent constitutional power the President may have to discharge officers serving at the pleasure of the President. The short answer to this argument is that it nowhere purports to be such an exercise. And in any case the President didn't discharge appellant. The Secretary of State did this.

The only overriding legal authority, i.e., which could permit appellant's discharge without observance of the provisions of the Foreign Service Act, was the McCarran Rider.[9] This is the reason why it was invoked in addition to Executive Order 9835. But this does not alter the fact that

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[8] A statute passed on August 26, 1950 (Public Law 733, 81st Cong. 2d Sess., 64 Stat. 476, 5 U.S.C.A. § 22-1 et seq.) was the first statute of any general application which purported to furnish a general authority for discharges on security grounds. This statute was never invoked in appellant's case.

[9] See its express provisions, p. 22.

the Secretary of State purported to act under *both* sources of authority.

Such, then, are the grounds upon which the record discloses this administrative action to have been taken. And that action ". . . cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its actions can be sustained." *Chenery, supra,* 318 U. S. at pp. 94-95.

The governing principle of law brought into play here is that all governmental action must be according to law; and that administrative action taken under a misapprehension of law is arbitrary and irrational and hence offensive to the basic requirements of due process of law, regardless of the breadth of discretion confided to the administrative agency. Such is the teaching of *Perkins* v. *Elg,* 307 U. S. 325 and the long line of cases of which it is a part, e.g., *Arenas* v. *United States,* 322 U. S. 419; *Wendell* v. *Spencer,* App. D. C. , 217 F. (2d) 858; *Pagano* v. *Brownell,* App. D. C. , F. (2d) , No. 12130 Oct. Term 1955, decided October 13, 1955, slipsheet opinion p. 10; *Rudder* v. *United States,* App. D. C. , F. (2d) , No. 12313 Oct. Term, 1955, decided July 21, 1955, slipsheet opinion, p. 3.

The *Chenery* case, *supra,* announces no more than a necessary corollary of this great principle: that the only way to assure that administrative action is in fact according to law is to judge that action by reference to the validity of the grounds invoked to support it when the action was taken.

In terms of the *Chenery* doctrine the present case may be put in this way: the record shows that the Secretary of State undertook to dismiss appellant as an exercise of his authority under both Executive Order 9835, as amended, and the McCarran Rider; his action must, therefore, be sustainable as exercises of *both* sources of authority since it is impossible to know what action he would have taken had he known

that his action was invalid as to any one of the grounds invoked.[10]

Stated differently, in terms of the broader principle of *Perkins* v. *Elg*: if the Secretary's dismissal of appellant was not a valid exercise of his Loyalty authority which he invoked to support it, his action cannot be sustained as a valid exercise of his discretion under the McCarran Rider because it occurred under just such a misapprehension of law as vitiated the Secretary of State's exercise of his discretion in *Perkins* v. *Elg*.

We turn now to the invalidity of appellant's dismissal under Executive Order 9835, as amended.

## 2. The Respects in Which Appellant's Dismissal Violated Executive Order 9835, as Amended.

Before examining the respects in which the Secretary's action was deficient under the Loyalty Order, it is important to see precisely what he said he did. After the portion of his affidavit already quoted above, the Secretary says (J.A. 82):

* * * * * * * * *

> "5. I made that determination solely as the result of the finding of the Loyalty Review Board and as a result of my review of the opinion of that Board. In making this determination, I did not read the testimony taken in the proceedings in Mr. Service's case before the Loyalty Review Board of the Civil Service Commission. I did not make any independent determination of my own as to whether on the evidence submitted before those boards there was reasonable doubt as to Mr. Service's loyalty. I made no independent judgment on the record in this case. There was nothing in the opinion of the Loyalty Review Board which would make it incompatible with the exercise of my responsibilities as Secretary of State to act on it. I

[10] We do not mean to concede or even suggest that his action was valid on either ground. Indeed, we show below pp. 21-38 that it was not valid under the McCarran Rider even when considered in isolation.

deemed it appropriate and advisable to act on the basis of the finding and opinion of the Loyalty Review Board. In determining to terminate the employment of Mr. Service, I did not consider that I was legally bound or required by the opinion of the Loyalty Review Board to take such action.[11] On the contrary, I considered that the opinion of the Loyalty Review Board was merely an advisory recommendation to me and that I was legally free [11] to exercise my own judgment as to whether Mr. Service's employment should be terminated and I did so exercise that judgment."

a. The Secretary of State Acted Solely on the Basis of of the Loyalty Review Board Opinion Which Was Illegal.

On December 13, 1951, the day of his discharge, appellant sought vainly to appeal to the Secretary of State on the ground, *inter alia,* that the Loyalty Review Board's opinion was unlawful because it had no jurisdiction to reverse the favorable finding of the Secretary and his Board concerning appellant's loyalty (J.A. 72).

On June 6, 1955, the Supreme Court established the validity of this position. In *Peters* v. *Hobby, et al.,* 349 U. S. 331, it held that the removal of Peters by Mrs. Hobby, under circumstances identical with those of appellant's dismissal, was invalid.

Since the Secretary dismissed appellant "solely as the result of the finding of the Loyalty Review Board" (J.A. 82) and since that Board's finding was an act of "administrative lawlessness" wholly beyond its jurisdiction, the Secretary's action was fatally tainted with the lawless action upon which it was "solely" based.

This suffices to establish the invalidity of appellant's dis-

[11] This expression on January 19, 1953, of the Secretary's understanding his legal position, occurring some 3 months after the decision of this Court in *Kutcher* v. *Gray,* 91 App. D.C. 266, 199 F. (2d) 783, 787, invites comparison with his earlier statement (discussed *supra* p. 11-13) on the date of his discharge of appellant, December 13, 1951—some 10 months before decision of the *Kutcher* case.

missal as an exercise of the Secretary's authority under Executive Order 9835, as amended.

This was not the only vice of the Loyalty Review Board action upon which the Secretary "solely" based his action. The Loyalty Review Board's action was unlawful in other respects. In our brief in the District Court we detailed the many infirmities of this Board's action, showing that no valid finding adverse to appellant's loyalty could have resulted from the whole course of the proceedings against him before the Department of State Loyalty Security Board and before the Loyalty Review Board. For, throughout the entire proceedings, appellant was never accorded the fair hearing to which he was entitled under the provisions of Executive Order 9835, as amended. We there showed that throughout the "hearings" information was kept secret from appellant, not for the sake of national security but for secrecy's sake alone, for no confidential informant or other conceivably valid security consideration was involved; that the Loyalty Review Board's adverse finding was based wholly on this undisclosed evidence which appellant had no opportunity to refute or explain (J.A. 8, 11); that, in any case, none of the evidence relied upon by that Board could rationally support its conclusion unfavorable to appellant's loyalty; and that that Board's action for these and other reasons violated Executive Order 9835 or the Constitution of the United States. We do not repeat these matters here in detail [12]—although they go to the heart of the irreparable injury which appellant has suffered—because other considerations so clearly demonstrate the unlawfulness of appellant's dismissal under the Loyalty Executive Order.

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[12] These various matters are dealt with at pp. 18-41 and 46-48 of our brief in the District Court. While not a part of the record, it is a public document and additional copies of it are being filed with the Clerk for the convenience of the Court in the event it wishes to examine these matters.

b. The Secretary of State Made No Independent Determination on All the Evidence That There Was a Reasonable Doubt of Appellant's Loyalty.

But wholly apart from the fact that the Secretary of State relied "solely" on the unlawful action of the Loyalty Review Board, his dismissal of appellant independently violated a basic mandate of Executive Order 9835, as amended.

If the Executive Order were not textually clear, the decision of this Court in *Kutcher* v. *Gray*, 91 App. D. C. 266, 199 F. (2d) 783 establishes the law that under Executive Order 9835 it was the *duty* of the Secretary of State to make his own impartial determination on all the evidence as to the doubtfulness of appellant's loyalty. There, this Court said (at 199 F. (2d) 787):

> "In the light of these explicit provisions of the Executive Order we think there can be no doubt that the decision of the Branch Board was in legal effect exactly what the Executive Order declared it should be, a 'recommendation' to the Administrator for Kutcher's removal. It was just that—nothing more. The final decision rested with the Administrator. Upon him fell the duty to impartially determine on all the evidence whether there were reasonable grounds for belief that Kutcher was disloyal to the Government of the United States. That was the ultimate, the controlling issue. Kutcher was entitled to the Administrator's decision of that very question."

But the Secretary of State tells us that in making the determination to discharge appellant (J.A. 82):

> "5. * * * I did not make any independent determination of my own as to whether on the evidence submitted before those boards there was reasonable doubt as to Mr. Service's loyalty. I made no independent judgment on the record in this case * * *."

Under the Executive Order appellant was entitled to the Secretary's decision of that very question. The then

Secretary avows that appellant did not get such a decision.

There is thus no question but that by relying solely on the Loyalty Review Board's act of "administrative lawlessness," and by failing to perform on his own independent duty to make an independent and impartial decision on all the evidence as to whether there was a reasonable doubt of appellant's loyalty, the Secretary of State wholly failed to exercise validly his authority under the Executive Order and denied to appellant the rights guaranteed him by that Order. That being so, his purported exercise of that authority must be set aside and appellant must be ordered restored to his former position.

### B. Apart from Executive Order 9835, Appellant's Dismissal Was Not Validated by the McCarran Rider.

While we believe the considerations advanced above fully establish the illegality of appellant's dismissal, it is demonstrable that the Secretary's action in the circumstances of this case was not a proper exercise of the authority conferred on him by the McCarran Rider, even when viewed in isolation and without regard to the fact that the Secretary purported to be acting against appellant also under the Loyalty Program.

#### 1. The History of the McCarran Rider

The second of the two sources of authority invoked by the Secretary of State was § 103 of Public Law 188, 82nd Congress (65 Stat. 575, 581). This was a so-called rider attached to the State Department Appropriation Act for the fiscal year ending June 30, 1952—the fiscal year in which appellant happened to be discharged. This rider is commonly called "The McCarran Rider" and because it appears from year to year with different Public Law numbers, its history may be briefly delineated. This is a matter of some importance in connection with the discussion of the State Department Regulations which follows.

The McCarran Rider was first enacted as a rider to the State Department Appropriation Act of 1947, on July 6, 1946. It provided:

> "Notwithstanding the provisions of Section 6 of the Act of August 24, 1912 (37 Stat. 555), or the provisions of any other law, the Secretary of State may, in his absolute discretion, on or before June 30, 1947, terminate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interests of the United States [but such termination shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government if declared eligible for such employment by the United States Civil Service Commission]." (Brackets supplied.)

In each of the succeeding years through July 10, 1952, i.e., through the fiscal year 1953, this rider was reenacted. In all years following 1946, the material included in brackets [ ] in the above quotation was eliminated. The substantive provision was undeviating; there were changes in the operative dates and other minor textual variations not here relevant. Since it was not permanent legislation it appeared as a part of a different public law each year, as follows:

1. *Public Law 490,* 79th Congress, 2nd Sess., Department of State Appropriation Act. 1947, enacted July 5, 1946 (60 Stat. 458).
2. *Public Law 166,* 80th Congress, 1st Sess., Department of State Appropriation Act, 1948, enacted July 9, 1947 (61 Stat. 288).
3. *Public Law 597, § 104,* 80th Congress, 2nd Sess., Department of State Appropriation Act, 1949, enacted June 3, 1948 (62 Stat. 315).
4. *Public Law 179, § 104,* 81st Congress, 1st Sess., Department of State Appropriation Act, 1950, enacted July 20, 1949 (63 Stat. 456).
5. *General Appropriations Act, 1951, § 1213,* Public Law 759, 81st Congress, 2nd Sess., enacted Septem-

ber 6, 1950 (64 Stat. 609). This act extended the McCarran Rider powers also to the Secretary of Commerce.

6. *Public Law 188, § 103,* 82nd Congress, 1st Sess., Department of State Appropriation Act, 1952, enacted October 22, 1951 (65 Stat. 581).
7. *Public Law 495, § 103,* 82nd Congress, 2nd Sess., Department of State Appropriation Act, 1953, enacted July 10, 1952 (66 Stat. 555).

**2. The Secretary of State Dismissed Appellant in Violation of His Own Regulations Governing Dismissals Under the McCarran Rider Power.**

In the Court below the Government argued that the Secretary of State could have exercised the "absolute discretion" confided to him by the McCarran Rider in a completely *ad hoc* fashion; that he might have sought out and acted upon the advice of any random person he met in the corridor as to the advisability of dismissing any employee; or that he might have merely tapped any employee at random and dismissed him out of hand on the ground that it was in the national interest to do so. Therefore, the argument goes, the Secretary was free to do so in appellant's case after receipt of the Loyalty Review Board finding, even though he had reached the opposite decision every time he had considered on the merits the question whether appellant's dismissal would be advisable in the interests of the United States.

It is not necessary, for the purposes of the present argument, to challenge the proposition that the Secretary could have proceeded generally "without notice of charges, hearing or appeal" (J.A. 88). For the fact is that he did not purport to do so. And his action, therefore, must be judged by the manner in which he did in fact purport to exercise his McCarran Rider authority, not by how he might have.

What the Secretary in fact did was to promulgate regulations of general application prescribing standards and

procedures governing the exercise of his absolute discretion under the McCarran Rider in individual cases. Having done this he was not free to sidestep these general regulations in a particular case. *Accardi* v. *Shaughnessy,* 347 U. S. 260; *Sheridan-Wyoming Coal Co.* v. *Krug,* 83 App. D. C. 162, 172 F. (2d) 282, at 287. In *Accardi,* the Attorney General need not have issued general regulations delegating to the Board of Immigration Appeals his discretionary power to suspend deportations in certain cases; he could have retained its exercise to himself and presumably could have withheld its application to Accardi. But he did in fact issue the regulations and delegated the exercise of his discretion to the Board. And the Supreme Court observed (347 U. S., at p. 267):

> "* * * In short, as long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner."

So, here, the validity of the Secretary's dismissal of appellant as an independent exercise of the McCarran Rider power must be judged by whether it conformed to his own regulations governing this subject.

We turn now to the regulations and the respects in which they were violated.

As is shown *supra,* p. 10, the formal letter of charges preferred against appellant on March 24, 1950 (J.A. 28) was accompanied by a copy of the regulations and procedures promulgated on March 11, 1949, establishing loyalty and security principles and procedures. Appellant was specifically charged under these March 11, 1949, regulations and advised that he would be given a hearing under them to determine whether the Secretary of State should dismiss him under the McCarran Rider, which at that date was contained in § 104 of Public Law 179, 81st Cong., First Session. At no time during the proceedings before the Secretary was appellant ever advised of any other regula-

tions or was it suggested that he was being tried under regulations other than those furnished to him when his trial commenced. Accordingly, it has been our assumption that these are the regulations governing appellant's case and by which the validity of his dismissal should be determined.

But at the argument before the District Court, the Government contended that appellant's case should not be judged by these regulations of March 11, 1949, but by some others,[13] the existence of which appellant was never advised until during the proceedings in the District Court. These additional regulations consist of amendments to the March 11, 1949, regulations under dates of May 4, 1951, and September 21, 1951.

While we believe that in the circumstances of this case appellant plainly is entitled to have his case judged by the regulations under which he was told he was being tried, we will not argue the point in detail since we will show that his dismissal was invalid under either version of the regulations.

a. The Regulations and Procedures of March 11, 1949.

(i) *Section 391.3.* This section of the regulations under which appellant was told he was being tried is set out *supra*, p. 11. After quoting verbatim from the McCarran Rider, it concluded:

> "In the exercise of this right [the right to discharge under the McCarran Rider] the Department will, so far as possible, afford its employees the same protection as those provided under the Loyalty Program."

This promise was certainly kept to the ear for appellant was "processed" under the Loyalty Program for 22 months, with some 58 hours of hearings before the Department of State Loyalty-Security Board and a further day's hearing at the initiation of the Loyalty Review Board. But

[13] Actually, the Government contended that even these other regulations are not controlling. This matter is discussed below, pp. 29-35.

the promise was denied to the hope, as we have shown at length above, pp. 17-21, in detailing the respects in which appellant was denied the protections of Executive Order 9835, as amended. Consequently, under the Secretary's own regulations governing the exercise of his McCarran Rider authority, his action under that statute is invalid for the same reasons that made it invalid under Executive Order 9835.

(ii) *Section 395.1* of the same regulation provides:

> "As indicated in Sec. 394, before any officer or employee of the Department of State or of the Foreign Service of the United States is removed from employment for disloyalty or as a security risk, *he shall* be provided with a statement of the charges against him, and *be granted the right to* a hearing before the LSB and *an appeal to the Secretary of State, or his designee or designees.* * * * " (Italics supplied.)

Admittedly, appellant was not accorded an appeal to the Secretary of State, or his designee before his removal. He vainly sought such an appeal and was told the decision had already been taken by the Secretary and that the press had already been notified to receive the Secretary's announcement of appellant's dismissal (JA. 72). The denial of this right guaranteed appellant by the Secretary's own regulations amounted to an independently fatal impairment of his dismissal of appellant under the McCarran Rider.

The result is the same under the later amendments to the Secretary's regulations, as we shall now see.

b. The Regulations and Procedures, as Amended, Through September 21, 1951.

(i) *Section 391.3* of the amended regulations[14] invokes

[14] "391.3 *Security Authority.* The Secretary of State has been granted by Congress (Public Law 733, 81st Congress; General Appropriations Act, 1951, Section 1213, Public Law 759, 81st Congress) the right in his absolute discretion to terminate the employment of any officer or employee of the Department of State (including the Foreign Service of the United States) or to suspend the employment of any such officer or em-

as authority for dismissals in "security" cases (as distinguished from "loyalty" cases, dealt with by § 391.2) two statutes: (1) the McCarran Rider which, in September, 1951, was embodied in § 1213 of the General Appropriations Act, 1951, Public Law 759, 81st Congress, 2nd Sess., and (2) Public Law 733, 81st Cong., 2nd Sess., 64 Stat. 476 (1950), 5 U.S.C.A. § 22—1 et seq., which authorized the Secretary to suspend employees without pay and, after giving charges in writing, opportunity to answer, a hearing, review by the agency head and a written statement of the decision, in his absolute discretion and when deemed necessary in the interest of national security, to discharge such employee. The authority of this law was never invoked in appellant's case. He was never suspended without pay.

After referring to the McCarran Rider and Public Law 733, § 391.3 of the Secretary's Regulations provides:

> "* * * So far as it relates to the handling of security cases, the statement of procedures below is promulgated under the authority of *these* laws." (Italics supplied.)

If these regulations are thought to govern, the meaning of this section must be that so far as the "security risk" charges preferred against appellant, as distinguished from the "loyalty" charges also preferred against him, these regulations are promulgated under the authority of the McCarran Rider and will govern exercises of authority under that legislation.

(ii) *Section 393.1* establishes both substantive and procedural standards for dismissals under the authority already referred to, i.e., McCarran Rider *and* Public Law 733.

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ployee and, following such investigation and review as he deems necessary, to terminate the employment of the officer or employee whenever he shall determine such termination necessary or advisable in the interest of the national security of the United States, and such determination by the Secretary of State is conclusive and final. So far as it relates to the handling of security cases, the statement of procedures below is promulgated under the authority of these laws."

According to this section the standard to be applied under both the McCarran Rider and Public Law 733 is the narrower standard prescribed by Public Law 733, i.e., dismissal must be necessary or advisable "*in the interest of national security,*" not the arguably broader McCarran Rider standard, "*in the interests of the United States.*" This section provides:

> "393.1 *Security Standard.* The standard for removal from employment in the Department of State under the authority referred to in Section 391.3 shall be that on all the evidence reasonable grounds exist for belief that the removal of the officer or employee involved is necessary or advisable in the interest of national security. The decision shall be reached after consideration of the complete file, arguments, briefs, and testimony presented."

At no time has the Secretary of State purported to determine that appellant's dismissal was "necessary or advisable in the interest of national security." But beyond this it is perfectly plain that he did not, as this regulation required him to do, reach his decision "after consideration of the complete file, arguments, briefs, and tesimony presented." Instead, he states in his affidavit (J.A. 82):

> "5. I made that determination solely as the result of the finding of the Loyalty Review Board and as a result of my review of the opinion of that Board. In making this determination, I did not read the testimony taken in the proceedings in Mr. Service's case before the Loyalty Review Board of the Civil Service Commission. I did not make any independent determination of my own as to whether on the evidence submitted before those boards there was reasonable doubt as to Mr. Service's loyalty. I made no independent judgment on the record in this case."

Now, we do not contend, as the Government suggested below, that the Secretary was required to read all the testimony in the case. But this regulation governing the exercise of the Secretary's McCarran Rider power is no more nor less than the counterpart of the provision of Executive

Order 9835 which this Court dealt with in *Kutcher* v. *Gray*, *supra*. Within the allowable limits of *Morgan* v. *United States*, 304 U. S. 1, 17-18, the Secretary had the duty to make his own independent determination *on all the evidence*. He asserts that he did not do so. For this reason, therefore, his dismissal of appellant was in flagrant violation of his own general regulation which he was not at liberty to sidestep in appellant's case.

(iii) *Section 395.1* contains the identical guarantee of an opportunity to appeal to the Secretary or his designee before being dismissed as was contained in § 395.1 of the March 11, 1949, regulations. And the Secretary's refusal to allow appellant this appeal which he sought in timely fashion impairs the validity of his dismissal action just as fatally as it did under the 1949 regulations.

It is thus apparent that the Secretary of State wholly failed to accord appellant the procedural and substantive guarantees of either version of the regulations by which he prescribed the manner in which he would exercise his McCarran Rider authority. It remains to examine the defensive arguments advanced by the Government on this phase of the case.

c. The Government's Defensive Arguments Concerning the Secretary's Regulations.

In the District Court the Government made three basic contentions in response to the foregoing arguments concerning the Secretary's violation of his own regulations. The first was that neither version of the Secretary's regulations has any application to the exercise of the authority conferred by the McCarran Rider; the second was that the regulations were only a statement of policy which the Secretary was free to disregard at his discretion; and the third was that in any case the Secretary could not lawfully bind himself by any regulations purporting to impose limita-

tions on the manner and circumstances in which he would exercise that power.

(i) *The applicability of the Secretary's Regulations to exercises of McCarran Rider authority.* The first defensive argument, as we understand it, goes as follows: the Secretary's Regulations deal with two categories of cases, loyalty cases and security risk cases. Loyalty cases are dealt with under the authority of Executive Order 9835, as amended, and security risk cases are dealt with under the authority of Public Law 733, 81st Cong., 2nd Sess. (64 Stat. 476). But McCarran Rider dismissals are not "security risk" dismissals and hence an exercise of the McCarran Rider authority is not governed by the Secretary's regulations. It will be seen that this argument relies heavily on the semantics of "security risk." But there are two quite conclusive answers to it.

*First,* both versions of the regulation in terms purport to be issued under the authority of the McCarran Rider; both purport to provide for "security" dismissals under the authority of the McCarran Rider—the 1949 version relying solely on this authority and the 1951 version relying on this source *and* Public Law 733. Thus, the Government's effort as an afterthought to establish a dichotomy between "security" cases under Public Law 733 and "in the interests of the United States" cases under the McCarran Rider, finds no support in the texts of the regulations themselves.

*Second,* Public Law 733 was not enacted until August 26, 1950—some five months after these proceedings were commenced against appellant. At that time, March 24, 1950, appellant was formally charged on both loyalty and security risk grounds. And the authority under which he was told he might be discharged was the authority of the McCarran Rider. He could not have been charged as a security risk at that time under Public Law 733 for it had not been enacted. But he was so charged as a security risk as

well as on loyalty grounds under the McCarran Rider authority. The regulations purported to invoke the authority of the McCarran Rider and to be issued under its authority and they must be so judged.

(ii) *The Secretary's regulations as mere policy statements.* The government's second defensive argument is that "* * * At the most the 1949 regulation was only a statement of the Department's policy, to follow, insofar as it was possible, an established procedure and accord some procedural protections before ordering a summary dismissal. However, the degree to which the procedural protections of the loyalty program would be accorded an employee dismissed under Public Law 188 (the McCarran Rider) was certainly intended to remain within the sole discretion of the agency." (Gov't Brief, District Court, p. 14.)

This is like the argument discussed at the outset under Point I, A. It is a shocking suggestion, but the fact is that the Secretary of State never purported to prescribe these elaborate procedures with the inarticulate premise that they would be given the appearance of application throughout the proceeding against appellant and then wholly disregarded at the end. The regulations themselves afford no support whatever for the existence of such a fraudulent intent. They are cast in mandatory language and they must obviously be adhered to until they are repealed. *Accardi* v. *Shaughnessy, supra.*

(iii) *The validity of the Secretary's Regulations under the McCarran Rider.* The final defensive argument is that "it would have been manifestly contrary to the intent of Congress if the Secretary of State had bound himself to follow the provisions of Executive Order 9835 in dismissing employees under Public Law 188 * * *. Obviously, Congress wanted the Secretary of State to take action more summary than that provided for by Executive Order 9835,

and it would require something far more specific than the regulations cited by plaintiff to compel the conclusion that the Secretary of State had attempted to vitiate Public Law 188 in this manner." (Gov't Brief, District Court, p. 15.)

The District Court adopted this view in substantially identical language in its opinion (J.A. 88), stating its conclusion first and its premise second.

> "* * * It was not the intent of Congress that the Secretary of State bind himself to follow the provisions of Executive Order 9835 in dismissing employees under Public Law 188. This power of summary dismissal would not have been granted the Secretary of State by the Congress if the Congress was satisfied that the interests of this country were adequately protected by Executive Order 9835."

This reasoning is faulty in several respects. *First.* There is not one suggestion in the statute itself that Congress was concerned one way or the other as to the procedure which the Secretary might adopt to govern his exercises of the discretion confided to him.

*Second.* There is nothing in the statute—and there is no legislative history whatever [15]—to suggest that Congress in fact "wanted," i.e., imposed a duty on, the Secretary of State to "take action more summary than that provided by Executive Order 9835." Nor is there any suggestion that Congress conceived that that Executive Order inadequately protected the interests of the country *because* it accorded to employees certain minimal procedural protections consistent with the requirements of fair play. Neither

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[15] Senator McCarran's amendment to the House Bill 6056 was adopted by the Senate without debate or comment on June 21, 1946 (92 Cong. Rec. 7295). After conference, the House Managers announced their intention to recede from their disagreement with the Senate and concur in the amendment (92 Cong. Rec. 8001) and the House voted to recede and concur, without debate or comment, on June 29, 1946 (92 Cong. Rec. 8004).

the Government nor the District Court tendered any citation of authority or reason why this strained implication of intent should be raised to support such a novel conclusion.

*Third.* On its face, the statutory language suggests that the Congress was wholly concerned with supplying the Secretary of State with a *substantive* authority which it conceived him to need. And, as we have shown *supra,* pp. 14-15, Congress was entirely correct in this. The reason, if any, why the interests of the country were not adequately protected by Executive Order 9835 was that that Order had no substantive teeth in it so far as a Foreign Service Officer was concerned; it did not of its own force even purport to authorize the Secretary of State to discharge any employee. And the Foreign Service Act of 1946 prescribed procedures quite different from those of the Executive Order which must be followed by the Secretary of State in dismissing a Foreign Service Officer. The McCarran Rider supplied the necessary substantive authority to permit the Secretary to effect discharges of such officers without regard to the Foreign Service Act. Why else was Congress at such pains to extend the Secretary's discretionary authority expressly to officers of the Foreign Service? Under this substantive authority the Secretary could, in a valid exercise of his authority under the Loyalty Order, have discharged a Foreign Service Officer "in the interests of the United States," as he purported to do in this case.

Thus, the objective legal position of the Secretary of State at the time is powerfully persuasive that it was this *substantive* purpose which Congress sought to accomplish by statutory language fashioned precisely for that end. Elementary canons of construction teach that in the face of such plain statutory language no court should strain to find an implication of some positive purpose to restrict or

prohibit the exercise of these substantive powers in accordance with procedures to which the Fifth Amendment is at least hospitable, if not exacting.

*Fourth.* As a matter of authority, the reasoning of the District Court fares no better. It could equally be argued that by confiding discretion to the Attorney General to suspend deportation, Congress "wanted" the Attorney General to be free to exercise that discretion in a summary manner. Yet in *Accardi* v. *Shaughnessy, supra,* the Supreme Court expresses no doubt whatever that the Attorney General was free by regulation to provide for the manner in which his discretion would be exercised and that, having done so, he could not "sidestep" his own regulations.

*Finally,* it may be observed that the view adopted by the District Court was advanced by the Government merely as an afterthought of advocacy. For, at the time these events were occurring, the Secretary of State plainly had no notion that he was promulgating regulations which he was free to disregard because Congress "wanted" him to act more summarily. In fact, his superior, the President of the United States, specifically instructed him to exercise his McCarran Rider authority in such a manner as to guarantee appellant substantially the procedural benefits which the Government now argues Congress "wanted" to deny him. For the fiscal year 1951, the McCarran Rider was embodied in § 1213 of the General Appropriations Act, 1951. When the President signed this bill, he wrote the Secretary of State on September 6, 1950, as follows (J.A. 90-91):

> "I am sure you will agree that in exercising the discretion conferred upon you by Section 1213s, every effort should be made to protect the national security without unduly jeopardizing the personal liberties of the employees within your jurisdiction. Procedures designed to accomplish these two objectives are set forth in Public Law 733, 81st Congress, which authorizes the summary suspension of civilian officers and

employees of various departments and agencies of the Government, including the Department of State.

"In order that officers and employees of the Department of State may be afforded the same protection as that afforded by Public Law 733, it is my desire that you follow the procedures set forth in that law in carrying out the provisions of Section 1213 of the General Appropriations Act."

Thus, every consideration of reason, authority and experience require the rejection of the District Court's reasoning by which it concluded that it was unnecessary—and, indeed, would have been unlawful—for the Secretary of State to abide by the procedural and substantive protections which he purported to guarantee to appellant by his own regulations.

Consequently, even when considered exclusively as an exercise of his McCarran Rider powers, the Secretary's dismissal of appellant in violation of his own regulations was unlawful and appellant must be ordered restored to his position.

**3. Appellant's Discharge Was an Arbitrary and Unlawful Exercise of the Secretary's Discretion Under the McCarran Rider.**

Apart from the fact that he discharged appellant in violation of his own regulations under the McCarran Rider, the Secretary's dismissal of appellant was independently invalid as a purported exercise of the McCarran Rider power. The power conferred by that statute is concededly broad and would, doubtless, be sufficient to accomplish appellant's dismissal if the Secretary's discretion had, in fact, been validly exercised. But it is well established that even absolute discretion may not be exercised in an arbitrary and unreasonable manner. *Rudder* v. *United States*, App. D. C. , F. (2d) , No. 12313 October Term, 1955. Such an arbitrary exercise occurs when an absolute discretion is exercised, or its exercise is refused,

under a misapprehension of law, *Perkins* v. *Elg*, 307 U. S. 325; *Arenas* v. *United States*, 322 U. S. 419, 432; *Pagano* v. *Brownell*, App. D. C. , F. (2d) , No. 12130, October Term, 1955; *Wendell* v. *Spencer*, App. D. C. , 217 F. (2d) 858, or because of some policy determination, *Mastrapasqua* v. *Shaughnessy*, 180 F. (2d) 999 (C.A. 2); *Cook Chocolate Co.* v. *Miller*, 72 F. Supp. 573 (D. C. D. C.).

It seems plain that the Secretary's dismissal occurred under just such a misapprehension of law as occurred in *Perkins* v. *Elg*. To be sure, he stated in his affidavit that (J.A. 82-83):

> "* * * In determining to terminate the employment of Mr. Service I did not consider that I was legally bound or required by the opinion of the Loyalty Review Board to take such action. On the contrary I considered that the opinion of the Loyalty Review Board was merely an advisory recommendation to me and that I was legally free to exercise my own judgment as to whether Mr. Service's employment should be terminated and I did so exercise that judgment." [16]

Even so, when he exercised that judgment "solely as the result of the finding of the Loyalty Review Board * * *," his December 13, 1951, press release (J.A. 35) makes it plain that he did so on the assumption that that finding was a valid and lawful one under Executive Order 9835. That was "* * * an assumption that is now conceded to be erroneous * * *," *Pagano* v. *Brownell, supra,* and his exercise of his discretion under this misapprehension was, therefore, an arbitrary and hence, unlawful one. *Perkins* v. *Elg, supra.*

Moreover, his exercise of discretion in this case was arbi-

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[16] Compare his statement, discussed *supra*, pp. 11-13, made at the time he discharged appellant concerning the "reversal" of his earlier decision and the binding effect of the Loyalty Review Board regulations.

trary in another respect. In his affidavit he tells us (J.A. 82):

> "* * * I did not make any independent determination of my own as to whether on the evidence submitted before those Boards there was reasonable doubt as to Mr. Service's loyalty. I made no independent judgment on the record in this case. * * * I deemed it appropriate and advisable to act on the basis of the finding of the Loyalty Review Board * * *."

But while he discharged appellant because he deemed it "advisable to act on the basis of the finding of the Loyalty Review Board," the McCarran Rider delegated him authority to discharge appellant only if in his absolute discretion he deemed it advisable "in the interests of the United States." Nowhere does the Secretary suggest that he reached any such independent judgment of his own. We are not here merely criticizing the Secretary's failure to use a particular word formula. He tells us that he made no independent judgment of his own. Yet that was plainly his duty under the statute. His failure to make this independent determination of his own that appellant's discharge was necessary or advisable in the interests of the United States is therefore subject to the same infirmity as was the failure of the Board of Immigration Appeals "* * * to exercise its own discretion * * *" in *Accardi* v. *Shaughnessy, supra,* 347 U. S. at p. 267.

In the light of his most recent expression on this general subject, it is evident that had Secretary Acheson addressed himself to the question on which the McCarran Rider required him to exercise his absolute discretion, he would not, himself—acting independently—have deemed it either necessary or advisable "in the interests of the United States" to have "* * * branded as of doubtful loyalty and dismissed" appellant "on evidence by persons whose identity not even his judges know and whose words, summar-

ized for them, are withheld from the defendant.'' [17] Acheson, Dean, *A Democrat Looks at His Party,* Harper & Brothers, New York, N. Y., 1955, p. 129. For, as he says, "The taint of injustice infects the whole proceeding'' *id.,* at p. 144).

Thus, apart from the fact that he purported to act under the Loyalty Order, as well as the McCarran Rider; and apart from the fact that he dismissed appellant in violation of his own regulations under the McCarran Rider, the Secretary's purported exercise of his discretion under that Rider was unlawful because it occurred under a misapprehension of law and because he made no independent judgment of his own on the vital matter which it was his duty alone to decide under the statute.

Appellant must be ordered restored to the position from which he was unlawfully dismissed.

## II. THE DISTRICT COURT ERRED IN FAILING TO ORDER THE SECRETARY OF STATE TO EXPUNGE FROM THE RECORDS OF THE DEPARTMENT OF STATE ALL MATERIAL SUGGESTING THAT THERE IS ANY REASONABLE DOUBT OF APPELLANT'S LOYALTY.

The District Court stated (J.A. 86) that:

> "* * * The action of this Loyalty Review Board being a nullity, the Civil Service Commission is directed to expunge from its records the Loyalty Review Board's finding that there is a reasonable doubt as to plaintiff's loyalty to the United States * * *."

This order falls considerably short of the relief requested

[17] Because he made no independent examination of the record, Secretary Acheson may well not have known it at the time; but as we showed in our brief in the District Court, pp. 18-41, this is precisely the basis on which the Loyalty Review Board made its finding of appellant's doubtful loyalty, on which Secretary Acheson relied "solely."

in Part I, 3 of the prayer for relief (J.A. 60). The broader request of the prayer is one to which appellant is justly entitled. Not only should a more detailed order be addressed to the Civil Service Commission. The District Court's order wholly fails to direct the Secretary of State to take affirmative action with regard to the records of the Department of State. In this respect, the District Court also erred and the Order of this Court should direct relief substantially as prayed in Part I, 3 of the prayer.

## CONCLUSION

For the reasons advanced above, appellant's separation from the Foreign Service of the United States in violation of the express provisions of the Foreign Service Act of 1946 was unlawful, whether regarded as an action under both Executive Order 9835, as amended, and the McCarran Rider or under either considered alone. Accordingly, appellant should be granted the relief sought in Part I, paragraphs 1 through 5 of the prayer for relief in the Third Amended Complaint.

Respectfully submitted,

C. E. Rhetts,
*Attorney for Appellant.*

**BRIEF FOR APPELLEES**

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,958

JOHN S. SERVICE, APPELLANT

*v.*

John Foster Dulles ~~HIRAM BINGHAM~~, ET AL., APPELLEES

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA*

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## QUESTIONS PRESENTED

In the opinion of appellees the questions presented are:

1. Whether the dismissal of a Foreign Service officer by the Secretary of State was valid, where the Secretary, as a result of an adverse opinion by the Loyalty Review Board of the Civil Service Commission which the Secretary recognized as merely recommendatory, determined to dismiss the officer both under the authority vested in him by Executive Order 9835 (the Government employees' loyalty program) and under the authority vested in him by the Department of State Appropriation Act, 1952 (65 Stat. 575, 581) which gave the Secretary of State "absolute discretion," notwithstanding the provisions of any other law, to terminate any Foreign Service officer whenever he might deem such termination "necessary or advisable in the interests of the United States."

2. Whether the regulations of the Department of State establishing procedures for the processing of loyalty and security risk cases were applicable where the Secretary of State determined to dismiss a Foreign Service officer, not on grounds of disloyalty or as a security risk, but as "necessary or advisable in the interests of the United States."

3. Whether, where an adverse finding of the Loyalty Review Board as to an employee's loyalty was unauthorized under the rule of *Peters* v. *Hobby*, 349 U. S. 331, the employee is entitled merely to have the Civil Service Commission expunge from its records that finding, or whether he is also entitled to have the records thereof in the Department of State expunged.



373492—56——1

# INDEX


| | Page |
|---|---|
| Counterstatement of case | 1 |
| Statute and regulations involved | 7 |
| Summary of argument | 7 |
| Argument | 9 |
| I. The dismissal of appellant was a valid exercise of the absolute discretion vested in the Secretary of State by Section 103 of the Department of State Appropriation Act, 1952 | 9 |
| A. The termination of appellant under the "absolute discretion" statute was not in contravention of applicable regulations of the Department of State | 13 |
| B. Even if it be assumed (contrary to our argument above) that the Department of State regulations are applicable to appellant's dismissal under the "absolute discretion" statute, there was no failure to comply with those regulations | 17 |
| II. The order of the District Court directing the Civil Service Commission to expunge from its records the adverse finding of the Loyalty Review Board gives appellant all the relief to which he is entitled | 23 |
| Conclusion | 24 |
| Appendix—Regulations of the Department of State in effect at the time of appellant's dismissal (adopted May 4, 1951, revised September 21, 1951) | 25 |


## CITATIONS


| Cases: | |
|---|---|
| *Arenas* v. *United States*, 322 U. S. 419 | 10, 12 |
| *The Assessors* v. *Osbornes*, 9 Wall. 567 | 22 |
| *Bailey* v. *Richardson*, 86 App. D. C. 248, 182 F. 2d 46, affirmed by an equally divided court, 341 U. S. 918 | 10 |
| *Blackmon* v. *Lee*, 92 App. D. C. 268, 205 F. 2d 13 | 10 |
| *Bruner* v. *United States*, 343 U. S. 112 | 22 |
| *Carter* v. *Forrestal*, 85 App. D. C. 53, 175 F. 2d 364 | 10 |
| *Cole* v. *Young*, —— App. D. C. ——, 226 F. 2d 337 | 14, 15 |
| *Deviny* v. *Campbell*, 90 App. D. C. 171, 194 F. 2d 876 | 12 |
| *Ex parte McCardle*, 7 Wall. 506 | 22 |
| *Helvering* v. *Gowran*, 302 U. S. 238 | 12 |
| *Jason* v. *Summerfield*, 94 App. D. C. 197, 214 F. 2d 273 | 10 |
| *Kohlberg* v. *Gray*, 93 App. D. C. 97, 207 F. 2d 35 | 10 |
| *Kramer* v. *United States*, 147 F. 2d 202 (C. A. 9) | 12 |
| *Kutcher* v. *Gray*, 91 App. D. C. 266, 199 F. 2d 783 | 11, 12, 18 |
| *Laughlin* v. *Eicher*, 79 App. D. C. 266, 145 F. 2d 700 | 12 |
| *Mastrapasqua* v. *Shaughnessy*, 180 F. 2d 999 (C. A. 2) | 12 |
| *Morgan* v. *United States*, 304 U. S. 1 | 19 |

Cases—Continued Page

*Myers* v. *Hollister*, —— App. D. C. ——, 226 F. 2d 346 ..... 15
*Perkins* v. *Lukens Steel Co.*, 310 U. S. 113 ..... 17
*Peters* v. *Hobby*, 349 U. S. 331 ..... 6, 7, 9, 11, 12, 23, 24
*Powell* v. *Brannan*, 91 App. D. C. 16, 196 F. 2d 871 ..... 10
*Scher* v. *Weeks* (No. 12827, decided January 19, 1956), —— App. D. C. ——, —— F. 2d —— ..... 10, 16
*Securities and Exchange Commission* v. *Chenery Corporation*, 318 U. S. 80 ..... 10
*Shachtman* v. *Dulles*, —— App. D. C. ——, 225 F. 2d 938 ..... 11
*United States* v. *Morgan*, 313 U. S. 409 ..... 19
*United States ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260 ..... 13
*Williams* v. *Cravens*, 93 App. D. C. 380, 210 F. 2d 874 ..... 10

Statutes:

Act of July 26, 1935, 49 Stat. 500, 44 U. S. C. 305 ..... 22
Department of State Appropriation Act, 1950, 63 Stat. 447 ..... 2
Public Law 188, 82d Cong. (Department of State Appropriation Act, 1952, 65 Stat. 575) ..... passim
Public Law 733, 81st Cong. (Act of August 26, 1950, 64 Stat. 476, 5 U. S. C. 22–1)) ..... 8, 14, 15, 17
Public Law 759, 81st Cong. (General Appropriation Act, 1951, 64 Stat. 595) ..... 14, 17

Congressional material:

Hearings pursuant to S. Res. 231 before a Subcommittee of the Senate Committee on Foreign Relations, 81st Cong., 2d sess.. 2

Miscellaneous:

Executive Order 9835 (March 21, 1947, 12 F. R. 1935) ..... passim
Executive Order 10241 (April 28, 1951, 16 F. R. 3690) ..... 3
Executive Order 10450 (April 27, 1953, 18 F. R. 2489) ..... 1
Regulations of Department of State of March 11, 1949 ..... 21, 22
Regulations and Procedures of the Department of State, adopted May 4, 1951, as revised September 21, 1951 ..... passim
Regulation 14 of the Loyalty Review Board (September 8, 1949, 14 F. R. 5518) ..... 2
Rule 8, F. R. C. P ..... 6

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 12,958

JOHN S. SERVICE, APPELLANT

*v.*

HIRAM BINGHAM, ET AL., APPELLEES

---

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA*

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## BRIEF FOR APPELLEES

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### COUNTERSTATEMENT OF CASE

This is an appeal by the plaintiff below from an order granting the motion of the defendants below for summary judgment (J. A. 89–90). Appellant is a former Foreign Service officer who was dismissed in 1951 by Secretary of State Acheson (J. A. 81–3). Appellees are the present Secretary of State, the members of the Civil Service Commission, and the former members of the Loyalty Review Board of the Civil Service Commission established by Executive Order 9835 (March 21, 1947, 12 F. R. 1935) and abolished by Executive Order 10450 (April 27, 1953, 18 F. R. 2489) (J. A. 40–1).

On March 24, 1950, the Chairman of the Loyalty Security Board of the Department of State notified appellant that a hearing had been scheduled under Section 395 of the Regulations and Procedures of the Department of State in order to consider charges against him with a view to making a recommendation to the Secretary of State as to whether or not his

employment should be terminated in the interest of the United States, pursuant to Section 104 of the Department of State Appropriation Act, 1950 (63 Stat. 447, 456) [which authorized the Secretary of State, notwithstanding the provisions of any other law, in his "absolute discretion" to terminate any Foreign Service officer "whenever he shall deem such termination advisable or necessary in the interests of the United States"]. The stated charges against appellant were that:

> * * * within the meaning of Section 392.2.f of Regulations and Procedures of the Department of State, you are a member of, or in sympathetic association with the Communist Party which has been designated by the Attorney General as an organization which seeks to alter the form of government of the United States by unconstitutional means; and further that within the meaning of Section 393.1.d of said Regulations and Procedures you are a person who has habitual or close association with persons known or believed to be in the category set forth in Section 393.1.a of said Regulations and Procedures to an extent which would justify the conclusion that you might through such association, voluntarily or involuntarily, divulge classified information without authority. (J. A. 28–30.)

Following extensive hearings attended by appellant and his counsel,[1] the State Department Loyalty Security Board concluded that reasonable grounds did not exist for believing that appellant was disloyal to the United States and that, notwithstanding his single serious indiscretion in the handling of classified information, he did not constitute a security risk to the Department of State (J. A. 28). This conclusion was approved by the Deputy Under Secretary of State (J. A. 42–3, 63). The Department of State requested the Loyalty Review Board of the Civil Service Commission to "post-audit" appellant's case, pursuant to the post-audit provisions of Regula-

[1] A transcript of these hearings was published as an appendix to the Hearings pursuant to S. Res. 231 before a Subcommittee of the Senate Committee on Foreign Relations, 81st Cong., 2d sess., pp. 1958–2509, commonly referred to as the "Tydings hearings". See J. A. 73.

tion 14 of the Loyalty Review Board (September 8, 1949, 14 F. R. 5518).[2]

After the issuance of Executive Order 10241 (April 28, 1951, 16 F. R. 3690), amending Executive Order 9835, the Loyalty Security Board of the Department of State again considered appellant's case under the new standard laid down in that Executive Order and determined that no reasonable doubt existed as to his loyalty to the United States (J. A. 28). This decision also was approved by the Deputy Under Secretary of State (J. A. 42–3, 63). The Department of State also referred this decision to the Loyalty Review Board of the Civil Service Commission for "post-audit" review.[3]

On October 11, 1951, the Loyalty Review Board of the Civil Service Commission advised appellant that after review of the file that Board had determined that the public interest required it to hold a new hearing, which would be based upon the charges previously issued to appellant by the Department of State Loyalty Security Board (J. A. 78–9). A hearing was held before a panel of the Loyalty Review Board attended by appellant and his counsel at which appellant and other witnesses testified.[4]

Subsequent to this hearing, appellant's attorney and the Chairman of the Loyalty Review Board entered into a stipulation to the effect that evidence had been taken at the hearing before the Loyalty Review Board on the issue as to whether appellant had disclosed information of a confidential or nonpublic character within the meaning of subparagraph d of paragraph 2a of Part V, "Standards", of Executive Order 9835, as amended; that since the letter of charges given appellant had not stated specifications as to the intentional or unauthorized disclosure by appellant of information of a confidential or nonpublic character, in order to avoid returning the

[2] See Annex 2 to defendant's motion for summary judgment which is contained in the original record in this Court but not printed in the Joint Appendix. It is set forth in the appendix to this brief, page 45, infra.

[3] See Annex 4 to defendants' motion for summary judgment which is contained in the original record in this Court but not printed in the Joint Appendix. It is set forth in the appendix to this brief, page 46, infra.

[4] See J. A. 73 and Annex 3 to affidavit of appellant in support of his motion for summary judgment which is contained in the original record in this Court but not printed in the Joint Appendix.

case to the Department of State for an amendment of the letter of charges, it was stipulated that the Loyalty Review Board might make a determination as if the original letter of charges had contained the following charge:

> Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States (J. A. 30–2).

On December 12, 1951, the Loyalty Review Board rendered its opinion that there was reasonable doubt as to appellant's loyalty, based on his intentional and unauthorized disclosure to one Philip Jaffe, the editor of Amerasia magazine, of documents and information of a confidential and non-public character; i. e., copies of appellant's reports to the Department of State of his official visits to the headquarters of the Chinese Communists in 1944 and 1945 and oral statements of information as to troop dispositions and military plans which appellant had acquired during his Government service in China (J. A. 1, 3–11).

On December 13 the Deputy Under Secretary of State informed appellant that the Secretary of State had been advised of the decision of the Loyalty Review Board and that he had directed the termination of appellant's employment in the Foreign Service "under the authority of Executive Order 9835, as amended, and Section 103 of Public Law 188, 82d Congress * * *" (J. A. 75–6). Section 103 of Public Law 188, referred to, was the "absolute discretion" provision in the then current Department of State Appropriation Act, which was identical with the statutory provision in the 1950 Appropriation Act referred to in the original letter of charges given appellant. Department of State Appropriation Act, 1952, 65 Stat. 575, 581 (quoted at page 7, infra).

On the same date the Department of State issued a press release referring to the decision of the Loyalty Review Board,

as well as the earlier decisions of the Department of State Loyalty Security Board, and concluding:

> The Chairman of the Loyalty Review Board has requested the Secretary of State to advise the Board of the effective date of the separation of Mr. Service. This request stems from the provisions of Executive Orders 9835 and 10241—which established the President's Loyalty Program—and the Regulations promulgated thereon. These Regulations are binding on the Department of State.
>
> The Department has advised the Chairman of the Loyalty Review Board that Mr. Service's employment has been terminated. (J. A. 35–7.)

Also on the same day, December 13, appellant and his counsel were granted an interview with the Deputy Under Secretary of State at which they requested that action on the basis of the Loyalty Review Board's decision be withheld until they could address further arguments to the Secretary of State. The Deputy Under Secretary at this time declined to defer action and stated that the determination to separate appellant from the Foreign Service had already been reached and that a press release had been prepared (J. A. 71–2).

Secretary Acheson, in making the determination to dismiss appellant, acted in the exercise of his authority under both Executive Order 9835, as amended, and under Section 103 of Public Law 188. Although he made that determination solely as a result of his review of the opinion of the Loyalty Review Board, and did not pass on the evidence submitted before that Board, he did not consider that he was legally bound or required by the opinion of the Loyalty Review Board to terminate appellant, but on the contrary considered that the opinion of the Loyalty Review Board was merely an advisory recommendation to him and that he was legally free to exercise his own judgment as to whether appellant's employment should be terminated, and he did so exercise his own judgment (J. A. 81–3).

373492—56——2

The formal notice of termination issued to appellant, dated December 17, 1951, cited as the authority for his termination Executive Order 9835, as amended, and Section 103 of Public Law 188, 82d Congress (J. A. 83–5).

Appellant then applied to the Civil Service Commission for relief and was informed by the Chairman of the Commission that the decision of the Loyalty Review Board was in the nature of a recommendation; that the Secretary of State, acting upon this recommendation, had terminated appellant's services pursuant to Executive Order 9835, as amended, and Section 103 of Public Law 188; and that the Civil Service Commission had no power to review the action of the Secretary of State, noting that the dismissal of Foreign Service officers was within the exclusive province of the Secretary of State (J. A. 38).

*Proceedings in the Court Below.* After the District Court had stricken appellant's original and first and second amended complaints for failure to comply with Rule 8, F. R. C. P., appellees answered plaintiff's third amended complaint and both sides filed motions for summary judgment with supporting affidavits (J. A. 40, 62, 70–85).

The District Court dismissed the action as to the former members of the Loyalty Review Board, on the ground that that Board had ceased to exist and the action had abated as to them (J. A. 85). It held, on the authority of *Peters* v. *Hobby*, 349 U. S. 331, that the decision of the Loyalty Review Board of the Civil Service Commission was a nullity, but that the Secretary of State had made the determination required under Public Law 188 that in his absolute discretion he deemed the termination of appellant necessary or advisable in the interests of the United States, and that hence his dismissal of appellant was valid under that Act (J. A. 85–8). Accordingly, the District Court denied appellant's motion for summary judgment and granted appellees' motion for summary judgment. It did, however, direct the Civil Service Commission to expunge from its records the findings of the Loyalty Review Board that there was a reasonable doubt as to appellant's loyalty (J. A. 89–90).

## STATUTE AND REGULATIONS INVOLVED

Section 103 of the Department of State Appropriation Act, 1952, 65 Stat. 575, 581, provided:

> *Notwithstanding the provisions of* Section 6 of the Act of August 24, 1912 (37 Stat. 555), or the provisions of *any other law,* the Secretary of State may, *in his absolute discretion,* during the current fiscal year, terminate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States *whenever he shall deem such termination necessary or advisable in the interests of the United States.* [Italics supplied.]

Regulations of the Department of State in effect at the time of appellant's dismissal (adopted May 4, 1951, and revised September 21, 1951), which appellant contends are relevant here, but which appellees contend were not applicable to appellant's dismissal, are set forth in the appendix, pages 25–44, infra.[5]

## SUMMARY OF ARGUMENT

I. Section 103 of the Department of State Appropriation Act, 1952 (65 Stat. 575, 581) vested the Secretary of State with "absolute discretion", notwithstanding the provisions of any other law, to terminate the employment of any Foreign Service officer, such as appellant, whenever he might deem such termination "necessary or advisable in the interests of the United States."

The Secretary of State made that determination here. The fact that he also dismissed appellant under the independent authority of Executive Order 9835 (the Government employees' loyalty program) and solely as the result of a finding of the Loyalty Review Board of the Civil Service Commission that there was reasonable doubt as to appellant's loyalty, which finding was unauthorized under the rule of *Peters* v. *Hobby,* 349 U. S. 331, is immaterial. Under the "absolute discretion"

[5] These regulations are contained in the original record in this Court but are not printed in the Joint Appendix.

statute the Secretary of State was free to take or not to take advice from any source he chose, governmental or non-governmental. This is not a case where the department head erroneously deemed himself bound by the recommendation of the Loyalty Review Board. Here Secretary Acheson recognized that the opinion of the Loyalty Review Board was only recommendatory and he exercised his own discretion. Even if the Secretary's dismissal of appellant be deemed invalid insofar as it was an exercise of authority under Executive Order 9835, it is valid as an exercise of the Secretary's authority under the independent "absolute discretion" statute.

A. The Secretary of State dismissed appellant in the exercise of his "absolute discretion" because he deemed it necessary or advisable in the interests of the United States. Appellant was not dismissed either on grounds of disloyalty or as a security risk. Hence, the elaborate procedures prescribed by Department of State regulations for the processing of loyalty and security cases had no application, and it is immaterial whether the Secretary complied with those regulations in dismissing appellant.

The fact that the security regulations cite the "absolute discretion" statute as well as the security risk statute (Act of August 26, 1950, 5 U. S. C. 22–1) as the legal authority for processing security risk cases does not mean that those regulations were to be followed in every case of a dismissal under the "absolute discretion" statute. The "absolute discretion" statute covers a broader field than security risks; i. e., dismissals in the "interests of the United States." The regulations were to be followed in security risk dismissals but not in a dismissal such as appellant's "in the interests of the United States" which was not a security risk case.

B. Even if it be assumed that the Department of State loyalty and security regulations were applicable to appellant's dismissal under the "absolute discretion" statute, there was no failure to comply with those regulations. They did not require that the Secretary of State personally read the complete file, testimony, and briefs. Under the regulations, it was sufficient that full consideration of the record be given by the Department of State Loyalty Security Board and by the Civil Service

Commission Loyalty Review Board, and it is not contended that they did not do so here.

The refusal of the Secretary of State to entertain an appeal by appellant from the adverse decision of the Loyalty Review Board was not a violation of the regulations. They provided for an appeal to the Secretary only from an adverse decision by the Department of State Loyalty Security Board. Here the Loyalty Security Board decided in favor of appellant and he, of course, did not seek an appeal from that ruling.

As stated, the Department of State loyalty and security regulations were not applicable at all to appellant's discharge. But if those regulations were applicable, it was the 1951 regulations in effect at the time of appellant's discharge, rather than the 1949 regulations in effect at the time the proceedings against him were initiated, that were controlling. In any event, appellant has not shown a violation even of the 1949 regulations. Those regulations did not require the Secretary of State to follow the procedure for loyalty cases under Executive Order 9835 in exercising his discretion under the "absolute discretion" statute.

II. The District Court directed the Civil Service Commission to expunge from its record the adverse finding of the Loyalty Review Board as to appellant, and that is all the relief to which he was entitled. Under *Peters* v. *Hobby*, 349 U. S. 331, appellant was not entitled to any order expunging records of the Department of State.

## ARGUMENT

### I. The dismissal of appellant was a valid exercise of the absolute discretion vested in the Secretary of State by Section 103 of the Department of State Appropriation Act, 1952

By Section 103 of the Department of State Appropriation Act, 1952 (65 Stat. 575, 581) Congress vested in the Secretary of State "absolute discretion," notwithstanding the provisions of any other law, to terminate any Foreign Service officer such as appellant whenever he might deem such termination "necessary or advisable in the interests of the United States."

In the exercise of this absolute discretion the Secretary of State was not required to comply with any procedural require-

ments whatever; he need not give an employee notice of charges, a hearing, or any other procedural benefits. The sole justiciable question in appellant's challenge to the validity of his dismissal under that statutory authority is whether or not the Secretary of State did in fact determine, in his absolute discretion, that the dismissal was "necessary or advisable in the interests of the United States."

Here Secretary Acheson made that determination. In his affidavit he states that he understood that the responsibility was vested in him to make the necessary determination under *both* Executive Order 9835 and Section 103, and that acting in the exercise of the authority vested in him as Secretary of State by both Executive Order 9835 and Section 103 he "made a determination to terminate the services of Mr. Service as a Foreign Service officer in the Foreign Service of the United States (J. A. 81–2). See *Securities and Exchange Commission* v. *Chenery Corporation,* 318 U. S. 80, 95; *Arenas* v. *United States,* 322 U. S. 419, 427.

The fact that he made that determination without reading or judging the adequacy of the record made before the Loyalty Security Board and the Loyalty Review Board (J. A. 82) does not vitiate the exercise of his "absolute discretion." For under the "absolute discretion" statute he was entitled to make his determination that it was in "the interests of the United States" to dismiss appellant, without regard to any record at all.

This Court will not, of course, review the propriety or adequacy of the reasons or motives which prompted Secretary Acheson to exercise his absolute discretion to terminate appellant. *Jason* v. *Summerfield,* 94 App. D. C. 197, 214 F. 2d 273; *Williams* v. *Cravens,* 93 App. D. C. 380, 210 F. 2d 874; *Kohlberg* v. *Gray,* 93 App. D. C. 97, 207 F. 2d 35; *Blackmon* v. *Lee,* 92 App. D. C. 268, 205 F. 2d 13; *Powell* v. *Brannan,* 91 App. D. C. 16, 196 F. 2d 871; *Bailey* v. *Richardson,* 86 App. D. C. 248, 182 F. 2d 46, affirmed by an equally divided court, 341 U. S. 918; *Carter* v. *Forrestal,* 85 App. D. C. 53, 175 F. 2d 364. See also *Scher* v. *Weeks* (No. 12827, decided January 19, 1956), —— App. D. C. ——, —— F. 2d ——, sustaining a dismissal under an essentially identical "absolute discretion" statute.

The fact that Secretary Acheson exercised his absolute discretion "solely as the result of the finding of the Loyalty Review Board and as a result of my review of the opinion of that Board" (J. A. 82) and that under the rule of *Peters* v. *Hobby*, 349 U. S. 331, the opinion of the Loyalty Review Board was not itself a valid exercise of governmental authority is quite immaterial. In the exercise of his absolute discretion, Secretary Acheson was free to take advice from any source he chose, governmental or non-governmental, or to take no advice from anyone.

Since Secretary Acheson "did not consider that I was legally bound or required by the opinion of the Loyalty Review Board to take such action", but, "on the contrary, I considered that the opinion of the Loyalty Review Board was merely an advisory recommendation to me and that I was legally free to exercise my own judgment as to whether Mr. Service's employment should be terminated and I did so exercise that judgment" (J. A. 82–3), this is not a case such as *Kutcher* v. *Gray*, 91 App. D. C. 266, 199 F. 2d 783; and *Shachtman* v. *Dulles*, —— App. D. C. ——, 225 F. 2d 938, where the head of a department took action under the erroneous belief that he was legally required to follow the recommendation of some other governmental body.

From the outset appellant was informed that the Secretary of State was considering his case under two separate, independent sources of authority; i. e., Executive Order 9835 and the "absolute discretion" statute (J. A. 28–30), and every official statement of the Secretary's determination (with one exception [6]) manifested that that determination was made under both sources of authority (J. A. 38, 75–6, 81–5; see pages 4–6, supra.).

Since Secretary Acheson dismissed appellant under the valid authority of the "absolute discretion" statute, the fact that he also relied upon the invalid "post-audit" opinion of the

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[6] The one exception was the press release of December 13, 1951, which cited Executive Order 9835 but not the "absolute discretion" statute (J. A. 35–7). The record does not show that Secretary Acheson ever approved or even saw the press release. In any event, it does not outweigh Secretary Acheson's sworn statement that he also relied on the "absolute discretion" statute and the other official pronouncements to the same effect.

Loyalty Review Board is immaterial, even if it be assumed, for purposes of the present argument, that that fact invalidated the determination of Secretary Acheson under Executive Order 9835.[7] "Where the discharge is premised upon the reasons severally, each one being allegedly sufficient, the invalidity of one would be immaterial to the result, so long as the valid remainder was sufficient." *Deviny* v. *Campbell,* 90 App. D. C. 171, 174, 194 F. 2d 876, 879.

Obviously if the District Court decides a case on two independent legal propositions and this Court determines one proposition to be sound and the other unsound, it affirms the judgment of the District Court rather than reversing it. *Laughlin* v. *Eicher,* 79 App. D. C. 266, 269, 145 F. 2d 700, 703; *Helvering* v. *Gowran,* 302 U. S. 238, 245–6. Even in a criminal case, the jury's verdict based on more than one count will not be set aside because one count has not been proved. *Kramer* v. *United States,* 147 F. 2d 202 (C. A. 9). There is no reason why the same rule should not apply to an administrative determination by a department head, as this Court stated in *Deviny* v. *Campbell,* supra.

None of the cases relied on by appellant (Brief, pp. 16, 35–6) supports his contention that Secretary Acheson's determination must be set aside unless it was valid under *both* Executive Order 9835 and the "absolute discretion" statute. None of his cases involved an administrative determination resting on two independent sources of authority, as here.[8]

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[7] We did not concede in the court below and do not concede here that Secretary Acheson's dismissal of appellant under Executive Order 9835 was invalid. *Peters* v. *Hobby,* 349 U. S. 331, was (on the record before the Supreme Court) a case like *Kutcher* v. *Gray,* 91 App. D. C. 266, 199 F. 2d 783, where the head of the Department erroneously deemed herself bound by the adverse opinion of the Loyalty Review Board and failed to make her own decision under Executive Order 9835 (see Record, pp. 8, 21, 24, 25, No. 376, Oct. Term, 1954). Here, in contrast, Secretary Acheson recognized that the opinion of the Loyalty Review Board was merely recommendatory and did make his own determination under Executive Order 9835 (J. A. 81–3).

[8] *Arenas* v. *United States,* 322 U. S. 419, 432 (relied on by appellant) states: "Even in some discretionary matters, it has been held that if an official acts *solely* on grounds which misapprehend the legal rights of the parties, an otherwise unreviewable discretion may become subject to correction. *Perkins* v. *Elg,* 307 U. S. 325, 349." [Italics supplied.]

Nor is this a case like *Mastrapasqua* v. *Shaughnessy,* 180 F. 2d 999 (C. A. 2), where there was a failure to exercise any discretion at all.

**A. The termination of appellant under the "absolute discretion" statute was not in contravention of applicable regulations of the Department of State**

Appellant contends that even though the "absolute discretion" statute did not itself require the Secretary of State to give a Foreign Service officer any procedural benefits; i. e., notice of charges, hearing, etc., the regulations of the Department of State did establish procedures in connection with such dismissals which the Secretary of State was bound to follow in appellant's case, under the rule of *United States ex rel. Accardi* v. *Shaughnessy,* 347 U. S. 260. We show here that the regulations on which appellant relies were not applicable to his dismissal under the "absolute discretion" statute, so the rule of the *Accardi* case has no application.

The regulations of the Department of State in effect at the time of appellant's dismissal are headed "Loyalty and Security of Employees" and open with a policy statement that the Department of State, because of its responsibility for the conduct of foreign affairs, is a target for persons engaged in espionage or subversion and because of this and the number of classified communications which pass through the Department, it is highly important that no person be employed "who is disloyal or who constitutes a security risk." (Reg. 390, 391.1; p. 26, infra.[9] The "Loyalty Authority" is stated to be Executive Order 9835 and the regulations of the Loyalty Review Board of the Civil Service Commission promulgated thereunder. This paragraph concludes: "So far as it relates to the handling of *loyalty cases,* the statement of procedures below is promulgated in accordance therewith." (Reg. 391.2; p. 26, infra.) [Italics supplied.]

The "Security Authority" is stated as follows:

> The Secretary of State has been granted by Congress (Public Law 733, 81st Congress; General Appropriations Act, 1951, Section 1213, Public Law 759, 81st Con-

[9] All "Reg." references are to the regulations and procedures of the State Department adopted May 4, 1951, as revised September 21, 1951. The full text of these is set forth in the appendix, pp. 25–44, infra.

> gress) the right in his absolute discretion to terminate the employment of any officer or employee of the Department of State (including the Foreign Service of the United States) or to suspend the employment of any such officer or employee and, following such investigation and review as he deems necessary, to terminate the employment of the officer or employee whenever he shall determine such termination necessary or advisable *in the interest of the national security* of the United States, and such determination by the Secretary of State is conclusive and final. *So far as it relates to the handling of security cases,* the statement of procedures below is promulgated under the authority of these laws. (Reg. 391.3, p. 27, infra.) [Italics supplied.]

Public Law 733, referred to in this paragraph, is the Act of August 26, 1950 (64 Stat. 476, 5 U. S. C. 22–1), which authorized the heads of several stated departments, including the Secretary of State, to dismiss any employee in his "absolute discretion * * * whenever he shall determine such termination necessary or advisable in the interest of the *national security.*" [Italics supplied.] [10]

Public Law 759, referred to in this paragraph of the regulations, was the "absolute discretion" provision authorizing the Secretary of State to dismiss any employee when deemed "necessary or advisable in the interests of the United States," as embodied in Section 1213 of the then current General Appropriation Act, 1951, 64 Stat. 595, 768.

The regulations provide for certain procedures in "Cases Involving Loyalty and Security," such as notice of charges, opportunity to answer, and right to a hearing before the Department of State Loyalty Security Board (Reg. 394.1, 394.12–394.14, 395.1–395.36; pp. 32–33, 37–38, infra).

With respect to *loyalty cases,* and *security cases* the regulations provide that in the notice of charges:

> * * * The authorities cited for proposed removal on grounds relating to loyalty shall be Executive Order

[10] This is the statute recently considered by this Court in *Cole* v. *Young,* —— App. D. C. ——, 226 F. 2d 337, now pending in the Supreme Court on certiorari.

> 9835 and any applicable statutes, such as section 9A of the Hatch Act and/or section 14 of the Veterans Preference Act of 1944; and for proposed removal on grounds relating to security shall be Public Law 733, 81st Congress, and General Appropriations Act, 1951, Section 1213, Public Law 759, 81st Congress. (Reg. 394.15; p. 34, infra.)

The loyalty case procedure is also made applicable to "Cases Involving Security Only" (Reg. 394.2, 394.22; p. 36, infra).

The basic fallacy in appellant's argument lies in his misreading of the regulations to reach the conclusion that under them every case of dismissal under the "absolute discretion" statute is to be processed under the procedure prescribed by the regulations for loyalty and security cases.

It is true that the "absolute discretion" statute is cited along with the Act of August 26, 1950 (authorizing dismissal in the interest of the national security), as the authority for the processing of security cases, and the statement of procedures (notice of charges, hearing, etc.) in the regulations is made applicable "So far as it relates to the handling of security cases * * *" (Reg. 391.3; p. 27, infra). Thus, with respect to security cases, the Secretary of State had a double-barreled authority: (1) the Act of August 26, 1950, authorizing dismissals "in the interest of the national security"; and (2) the "absolute discretion" statute authorizing dismissals "in the interests of the United States." Obviously, it is "in the interests of the United States" to remove an employee who is a security risk, so the citation of the "absolute discretion" statute as authority for handling security cases was apt. But it does not follow (and this is the basic fallacy in appellant's argument) that every dismissal under the "absolute discretion" statute is a security risk dismissal. The contrary is obviously true. The "absolute discretion" statute makes no reference to the national security and the authority granted under it is not limited to cases of security risks.[11] If the "absolute discretion" statute were con-

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[11] Compare this Court's holding in *Cole* v. *Young*, — App. D. C. ——, ——, 226 F. 2d 337, 339, that the Act of August 26, 1950, which authorizes dismissals "in the interest of national security," is not limited to persons occupying sensitive positions. See also, *Myers* v. *Hollister*, —— App. D. C. ——, 226 F. 2d 346.

strued as limited to security cases, it would merely cover the same ground already covered by the Act of August 26, 1950, under which the Secretary of State already had the authority to dismiss in his "absolute discretion" any officer or employee "when deemed necessary or advisable in the interest of the national security."

Insofar as appellant's case was handled in the Department of State under the authority of Executive Order 9835, it was, of course, a loyalty case, and the Department of State regulations for the handling of loyalty cases were applicable. But since appellant's case was also handled under the authority of the "absolute discretion" statute, it was in that respect, neither a loyalty case nor a security case but rather one involving the "interests of the United States". Appellant's premise that the Secretary, in dismissing him under the authority of the "absolute discretion" statute, treated him as a security risk is quite unfounded. As this Court pointed out in *Scher* v. *Weeks* (No. 12827, decided January 19, 1956), —— App. D. C. ——, —— F. 2d ——, a dismissal under the "absolute discretion" statute in the interests of the United States "carries no implication that he [the employee] might be either disloyal or a security risk." Consistent with this view, Secretary Acheson does not state that in the exercise of his authority under the "absolute discretion" statute he dismissed appellant either as disloyal or as a security risk (J. A. 81–3).

Accordingly, since appellant was not dismissed under the "absolute discretion" statute either as disloyal or as a security risk, the regulations of the Department of State prescribing procedures for cases of disloyalty and security risks had no application, and any failure to follow them was of no legal consequence.[12]

Appellant's claim that he was entitled to the security risk procedures in the Department of State regulations is not helped by his reliance upon the letter which the President wrote to the

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[12] The fact that appellant was given a notice of charges, hearing, etc., notwithstanding the fact Secretary Acheson was free to discharge him under the "absolute discretion" statute without any procedure was not an "elaborate hoax" (Appellant's Brief, p. 8). For the Secretary was also proceeding under Executive Order 9835, and under that authority the prescribed procedure was necessary.

Secretary of State at the time he signed the General Appropriations Act, 1951 (which contained the "absolute discretion" authority) (J. A. 90–1, quoted in appellant's brief, pp. 34–5).

In the first place, that letter manifests the President's concern to "protect the *national security* without unduly jeopardizing the personal liberty of the employees within your jurisdiction." [Italics supplied.] Hence, the President's letter is concerned only with the handling of security risk cases, whereas appellant was not dismissed as a security risk. In the second place, the President's letter did not confer any legal rights upon appellant. For any violation of the "desire" stated in that letter the Secretary of State was responsible to the President alone; he violated no duty which he owed to appellant. See *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 129.

**B. Even if it be assumed (contrary to our argument above) that the Department of State regulations are applicable to appellant's dismissal under the "absolute discretion" statute, there was no failure to comply with those regulations**

1. Appellant argues (Brief, pp. 27–8) that because the "Security Authority" in the regulations (quoted, pp. 13–14, supra) cites both the "absolute discretion" statute and the Act of August 26, 1950, and speaks of termination of employment "in the interest of the national security", the Secretary of State thereby limited himself, in exercising his authority under the "absolute discretion" statute, to security cases, notwithstanding the fact that the "absolute discretion" statute covers the broader field of dismissals "in the interests of the United States".

This is merely a rephrasing of the argument that we have disposed of above (pp. 15–16). The fact that the "absolute discretion" statute was cited, along with the Act of August 26, 1950, as authority for the handling of security risk cases forms no basis for concluding that by these regulations the Secretary in effect said that he would not exercise his authority under the "absolute discretion" statute in any cases other than security risk cases.

2. Appellant also contends (Brief, pp. 28–9) that there was a noncompliance with the provision in the statement of the "Security Standard" that "The decision shall be reached after

consideration of the complete file, arguments, briefs, and testimony presented" (Reg. 393.1; p. 29, infra).

We submit that this provision does not require that the Secretary himself shall read the "complete file, arguments, briefs, and testimony presented," as Secretary Acheson admittedly did not (J. A. 82). This paragraph of the regulations is an introductory statement to the procedures governing the processing of security risk cases and is merely a summary statement of that procedure, which subsequent paragraphs of the regulations spell out in detail as to the proceedings before the Department of State Loyalty Security Board (Reg. 394, 395; pp. 32–44, infra).

Considering the tremendous responsibilities of the Secretary of State for the conduct of foreign affairs, particularly in the light of the Korean crisis when these regulations were promulgated, it is inconceivable that the regulations should have been intended to thrust upon the Secretary personally the burden of studying the complete file, the testimony, the briefs and arguments submitted in every case presented to him for the dismissal or retention of an employee either as a security risk or under the "absolute discretion" authority. As an example, the transcript of the testimony in appellant's case runs to over 500 printed pages (see footnote 1, page 2, supra). There is no contention that the Loyalty Security Board and the Loyalty Review Board did not give careful, conscientious consideration to all the evidence, argument, and briefs, and the regulations require no more.

*Kutcher* v. *Gray,* 91 App. D. C. 266, 199 F. 2d 783, does not help appellant here. That was a dismissal under Executive Order 9835 where it appeared that the head of the agency had not made any independent determination of his own as to whether, in the language of that Executive Order, "on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States" but had erroneously deemed himself bound by the determination of the agency loyalty board and by a memorandum of the Loyalty Review Board that membership in an organization on the Attorney General's list made dismissal of the employee

mandatory. This Court's statement that it was the duty of the agency head "to impartially determine on all the evidence whether there were reasonable grounds for belief" that the employee was disloyal was in the language of the obligation imposed upon the agency head by the Executive Order itself. Here, of course, the "absolute discretion" statute did not impose upon the Secretary of State any obligation to make a determination "on all the evidence" or, indeed, on any evidence at all; and here Secretary Acheson did make his own independent determination (J. A. 81–3).

*Morgan* v. *United States*, 304 U. S. 1, also relied upon by appellant, is likewise inapplicable. In that case the Packers and Stockyards Act required the Secretary of Agriculture to make a determination after a "full hearing". The decision was not based upon any requirement of the Secretary's examination of the administrative evidence (304 U. S. at 18) but rather was based on the ground that the marketing agencies were not apprised of the claims made against them by the Department of Agriculture. On a subsequent consideration of that case, the Supreme Court expressly held that it was improper to examine the Secretary "regarding the process by which he reached the conclusions of his study, including the manner and extent of his study of the record * * *". *United States* v. *Morgan* 313 U. S. 409, 422.

3. Appellant further contends (Brief, p. 29) that the regulations gave him a right of appeal to the Secretary or his designee before being dismissed and that he was not given this right of appeal. This contention also is based on a misreading of the regulations. Correctly read, they did not provide for a right of appeal to the Secretary in the circumstances of appellant's case, as we here show.

Section 394.14 of the regulations (p. 33, infra) provides that the notice of charges to the employee shall inform him:

> * * * of his rights of appeal to the Secretary of State or his designee *in the event that a decision adverse to him is made by the Loyalty Security Board,* and as to the provisions governing such appeal as set forth in Section 396.1. [Italics supplied.]

Section 396.11 of the regulations similarly provides that the employee shall be advised in writing of his right to appeal to the Secretary of State or his designee:

> *If the decision of the Loyalty Security Board requires separation from employment* for disloyalty and in the interest of national security, or only in the interest of national security * * *. (Reg. 396.11, p. 41, infra.) [Italics supplied.]

Section 396.12 of the regulations (p. 42, infra) provides that the Secretary or his designee will hear the officer or employee on his appeal "Upon the exercise by the officer or employee of *such* right of appeal * * *". [Italics supplied.]

Thus, the provisions of the regulations granting a right of appeal to the Secretary of State are concerned only with appeals from decisions of the Department of State Loyalty Security Board adverse to the employee. This was, of course, not such a case since the Loyalty Security Board twice decided in favor of appellant so there could be no reason for him to appeal that Board's decisions to the Secretary of State.

Appellant relies upon the following provision of the regulations:

> As indicated in Section 394, before any officer or employee of the Department of State is removed from employment for disloyalty or as a security risk, he shall be provided with a statement of the charges against him, and be granted the right to an administrative hearing before the Loyalty Security Board and an appeal to the Secretary of State or his designee. (Reg. 395.1; p. 37, infra.)

The reference back in this section of the regulations to Section 394 (quoted at p. 19, above) makes it plain that the right of appeal referred to is the right to appeal from an adverse decision of the Department of State Loyalty Security Board. This is confirmed by the fact that this same section of the regulations provides:

> If the finding of the Secretary of State on appeal is that there are reasonable grounds to believe that he is disloyal, he may appeal to the Loyalty Review Board

> for a determination as to his loyalty. (Reg. 395.1; p. 37, infra.)

A similar provision is contained in Section 396.32 of the regulations (pp. 43–44, infra).

Nowhere in the regulations is provision made for an appeal to the Secretary from an adverse decision of the Loyalty Review Board. On the contrary, as quoted above, in a loyalty case the appeal was to the Loyalty Review Board from an adverse decision of the Secretary of State.

Accordingly, appellant was not deprived of any right of appeal to the Secretary of State.

4. Finally, appellant contends (Brief, pp. 25–6) that his dismissal should be set aside because, so he asserts, there was a failure to comply with Department of State regulations which were not in effect at the time Secretary Acheson determined to dismiss him.

The original letter of charges of March 24, 1950, served upon appellant attached a copy of the loyalty and security regulations of the Department of State in the form then in effect; i. e., the regulations of March 11, 1949 (J. A. 28–30).[13] Under the heading "Authority and General Policy," Section 391.3 of the 1949 regulations provided:

> In addition, the Secretary of State has been granted by Congress the right, in his absolute discretion, to terminate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interests of the United States. In the exercise of this right, the Department will, so far as possible, afford its employees the same protection as those provided under the Loyalty Program.

Prior to the Secretary's dismissal of appellant on December 13, 1951, however, the State Department regulations were revised and reissued on May 4, 1951, and further revised on September 21, 1951, so as to eliminate the last sentence quoted. Appellant contends that since the proceedings against him

[13] The Department of State regulations of March 11, 1949, are contained in the original record in this Court but are not printed in the joint appendix.

were initiated under the 1949 regulations then in effect the validity of the Secretary's termination of appellant must be tested by those regulations rather than by the 1951 regulations in effect at the time the Secretary dismissed appellant. Whether this novel contention rests upon some theory of estoppel, we are not told. It is not surprising that appellant is unable to cite any authority to support it. The courts decide cases in accordance with the law as it exists at the time of decision, not the law as of the time the action was initiated. *Bruner* v. *United States,* 343 U. S. 112; *Ex parte McCardle,* 7 Wall. 506; *The Assessors* v. *Osbornes,* 9 Wall. 567. No reason is apparent why the same rule should not apply to administrative determinations.

Incidentally, appellant's assertions (Brief, pp. 11, 24–5) that Department of State regulations are not distributed to all employees of the Department and that he was never informed of the 1951 regulations until after the institution of this action are, although legally immaterial, wholly unsupported in the record.[14]

In any event, even if the 1949 regulations were deemed controlling as to appellant's discharge in 1951, he has not shown a violation of those regulations. Section 391.3 of the 1949 regulations (quoted at p. 21, supra) is merely a statement of Department practice and policy, not a limitation on the exercise of the Secretary's authority under the "absolute discretion" statute. Considering that the latter statute did not require the Secretary of State to follow any procedure at all in dismissing an employee "in the interests of the United States," it would require language more explicit and mandatory than that contained in Section 391.3 of the 1949 regulations to compel the conclusion that the Secretary of State foreclosed himself from exercising his "absolute discretion" without either following the elaborate procedure under Executive Order 9835 or explaining to the satisfaction of a court his reasons for not doing so.

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[14] The Department of State loyalty and security regulations were not published in the Federal Register because the statute establishing the Federal Register contemplates that regulations such as these dealing only with procedures applicable to Government employees shall not be published in the Register. Act of July 26, 1935, 49 Stat. 500, 501, 44 U. S. C. 305.

Furthermore, we do not concede that in this case the Secretary failed to comply with the procedure prescribed by the Department of State regulations for dismissals under Executive Order 9835, although it does not seem necessary to argue that here in view of the fact that the Secretary dismissed appellant under the independent authority of the "absolute discretion" statute.[15]

Our argument at pages 19–21, above, showing that appellant was not denied any right of appeal to the Secretary under the 1951 regulations equally disposes of appellant's contention (Brief, p. 26) that he was denied a right of appeal to the Secretary under the 1949 regulations.

Accordingly, appellant's claim of non-compliance with the 1949 regulations is unsound for two reasons: (1) If the loyalty and security regulations of the Department of State were applicable at all to appellant's dismissal (although we have shown above that they were not), the applicable regulations were the 1951 regulations in effect at the time of the dismissal, not the superseded 1949 regulations. (2) Even if the 1949 regulations be deemed applicable, appellant has not shown a failure to comply with them.

In conclusion, the judgment below should be affirmed on the ground that the dismissal of appellant was a valid exercise of the authority granted the Secretary of State by the "absolute discretion" statute.

## II. The order of the District Court directing the Civil Service Commission to expunge from its records the adverse finding of the Loyalty Review Board gives appellant all the relief to which he is entitled

In the light of *Peters* v. *Hobby*, 349 U. S. 331, the court below directed the Civil Service Commission to expunge from its records the finding of the Loyalty Review Board that there was a reasonable doubt as to appellant's loyalty (J. A. 90).

[15] Our brief in the court below contains an elaborate showing that the Secretary did comply with the Department of State regulations under Executive Order 9835 in dismissing appellant. If this Court grants appellant's pending motion for leave to file here copies of his brief in the court below, we shall request leave, upon the argument of this case, to file copies of our brief in the court below.

Appellant contends that the court below should have also directed the Secretary of State "to take affirmative action with regard to the records of the Department of State" (Brief, p. 39). The short answer is that in *Peters* v. *Hobby* the Supreme Court did not direct the employing agency to take any action with respect to its records (349 U. S. at 349).

## CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

Respectfully submitted.

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# APPENDIX

REGULATIONS OF THE DEPARTMENT OF STATE IN EFFECT AT THE TIME OF APPELLANT'S DISMISSAL (ADOPTED MAY 4, 1951, REVISED SEPTEMBER 21, 1951) WERE AS FOLLOWS:

MANUAL OF

## REGULATIONS AND PROCEDURES

Department of State
Washington, D. C.

Transmittal Letter: RP–35
Date: May 4, 1951

1. MATERIAL TRANSMITTED:
   Subchapter 390, Loyalty and Security of Employees, pages 390 through 396.33.
2. EXPLANATION:
   Subchapter 390 has been revised to comply with the provisions of Public Law 733, 81st Congress, and the amendments to the regulations of the Loyalty Review Board, United States Civil Service Commission.
3. FILING INSTRUCTIONS:
   a. Remove pages 390 through 396.32 issued under TL: RP–2.
   b. Insert the attached pages of subchapter 390 immediately following page 388.8.

### NOTICE

Executive Order 10241 of April 28, 1951, amended the loyalty standard previously in effect to read as follows:

> 1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, there is a reasonable doubt as to the loyalty of the person involved to the Government of the United States.

This new loyalty standard supersedes the standard given in section 392.1 in the attached pages and amends various other

sections therein. A revision of these pages will be issued in the near future.

390 LOYALTY AND SECURITY OF EMPLOYEES

391 *General*

391.1 *Policy*

The Department of State, because of its responsibility for the conduct of foreign affairs, is a vital target for persons engaged in espionage or subversion of the United States Government. Owing to this fact and because of the great number of highly classified communications which pass through the Department, the security of which is essential to the maintenance of peaceful and friendly international relations, it is highly important to the interests of the United States that no person be employed in the Department who is disloyal or who constitutes a security risk. As used in these regulations, the term "Department of State" shall be construed to include the Foreign Service of the United States.

391.2 *Loyalty Authority*

On March 21, 1947, the President issued Executive Order 9835 to assure: (a) "that persons employed in the Federal service be of complete and unswerving loyalty to the United States"; (b) that the United States afford "maximum protection against infiltration of disloyal persons into the ranks of its employees"; and, at the same time, that (c) there be given equal protection to the loyal employees of the United States "from unfounded accusations of disloyalty." The regulations and directives duly promulgated by and under the authority of the Loyalty Review Board of the Civil Service Commission (hereinafter referred to as the Loyalty Review Board), in accordance with the provisions of Executive Order 9835, as set forth in title 5, chapter II, of the Code of Federal Regulations (13 F. R. 253), constitute the basic and controlling regulations to govern all loyalty adjudication procedures in the Department of State (including the Foreign Service of the United States). So far as it relates to the handling of loyalty cases, the statement of procedures below is promulgated in accordance therewith.

391.3 *Security Authority*

The Secretary of State has been granted by Congress (Public Law 733, 81st Congress; General Appropriations Act, 1951, Section 1213, Public Law 759, 81st Congress) the right in his absolute discretion to terminate the employment of any officer or employee of the Department of State (including the Foreign Service of the United States) or to suspend the employment of any such officer or employee and, following such investigation and review as he deems necessary, to terminate the employment of the officer or employee whenever he shall determine such termination necessary or advisable in the interest of the national security of the United States, and such determination by the Secretary of State is conclusive and final. So far as it relates to the handling of security cases, the statement of procedures below is promulgated under the authority of these laws.

(TL: RP–43) (9–21–51)

391.4 *Loyalty Security Board*

The Loyalty Security Board of the Department of State consists of at least three members, appointed by the Secretary of State. One of the members is designated by the Secretary as chairman. Any three members constitute a quorum for the transaction of business. The board considers and acts on all cases involving incumbent and excepted officers and employees of the Department of State and the Foreign Service of the United States, and all cases involving applicants for excepted positions in the Department and the Foreign Service in which a report of loyalty investigation is made by the Federal Bureau of Investigation, and all cases of officers and employees of the Department and the Foreign Service in which a report of security investigation is made and referred to the board by the responsible authorities of the Department. The board may operate through panels consisting of not less than three members of the board designated by the chairman, who shall also designate the chairman of each panel. The actions taken by panels shall be the actions of the board.

392 *Loyalty Standard*

392.1 The standard for the refusal of employment or the removal from employment in the Department of State under Executive Order 9835 on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States. The decision shall be reached after consideration of the complete file, arguments, briefs and testimony presented.

392.2 Activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty may include one or more of the following:

a. Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs.

b. Treason or sedition or advocacy thereof.

c. Advocacy of revolution or force or violence to alter the constitutional form of Government of the United States.

d. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or nonpublic character obtained by the person making the disclosure as a result of his employment by the Government of the United States.

e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

(TL: RP-35) (5-4-51)

f. Membership in, affiliation with, or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States or as seeking to alter

the form of Government of the United States by unconstitutional means.

392.3 Section 9A of the Hatch Act makes it unlawful for any employee of the Federal Government to have membership in any political party or organization which advocates the overthrow of our constitutional form of Government in the United States. The current appropriation act forbids the payment of salary or wages to any person who advocates, or who is a member of an organization that advocates, the overthrow of the Government of the United States by force or violence. Present membership in any of the organizations designated by the Attorney General as being within the scope of section 9A of the Hatch Act or as seeking to alter the form of government of the United States by force or violence, for the purpose of adjudicating cases under Executive Order 9835, is considered as bringing the case within the purview of section 9A of the Hatch Act and the applicable appropriation act. If, in the consideration of a case, the Loyalty Security Board finds as a fact that the individual is a member of such an organization or that he advocates the overthrow of the Government of the United States by force or violence, removal from or refusal of employment is mandatory.

393 *Security Standard and Principles*

393.1 *Security Standard*

The standard for removal from employment in the Department of State under the authority referred to in section 391.3 shall be that on all the evidence reasonable grounds exist for belief that the removal of the officer or employee involved is necessary or advisable in the interest of national security. The decision shall be reached after consideration of the complete file, arguments, briefs, and testimony presented.

(TL: RP–43) (9–21–51)

393.2 *Categories Constituting Security Risks*

Reasonable grounds shall be deemed to exist for belief that the removal of an officer or employee is necessary or

advisable in the interest of national security when he falls into one or more of the following categories:

a. A person who engages in, supports, or advocates treason, subversion, or sedition, or who is a member of, affiliated with, or in sympathetic association with the Communist, Nazi, or Fascist Parties, or of any foreign or domestic party or movement which seeks to alter the form of government of the United States by unconstitutional means or whose policy is to advocate or approve the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States; or a person who consistently believes in or supports the ideologies and policies of such a party or movement.

b. A person who is engaged in espionage or who is acting directly or indirectly under the instructions of any foreign government; or who deliberately performs his duties, or otherwise acts to serve the interests of another government in preference to the interest of the United States.

c. A person who has knowingly divulged classified information without authority and with the knowledge or belief or with reasonable grounds for the knowledge or belief that it will be transmitted to agencies of a foreign government, or who is so consistently irresponsible in the handling of classified information as to justify the conclusion of extreme lack of care or judgment.

d. A person who has habitual or close association with persons known or believed to be in categories a or b to an extent which would justify the conclusion that he might, through such association, voluntarily or involuntarily divulge classified information without authority.

e. A person who is of such habits or weakness of character as to justify the conclusion that he might lack discretion or good judgment in the handling of classified material and information.

(5-4-51) (TL: RP-35)

393.3 *Determining a Security Risk*

In determining whether or not an officer's or employee's removal is deemed necessary or advisable in the interest of

national security, the following factors, among others, will be taken into account, together with such mitigating circumstances as may exist:

a. Participation in one or more of the parties or movements referred to in section 393.2a, or in organizations which are fronts for, or are controlled by, any such party or movement, either by membership therein, taking part in its executive direction or control, contribution of funds thereto, attendance at meetings, employment thereby, registration to vote as a member of such a party, or signature of petition to elect a member of such a party to public office or to accomplish any other purpose supported by such a party; or by written evidences or oral expressions by speeches or otherwise, or political, economic, or social views. While an organization appearing on the Attorney General's list as a totalitarian, Fascist, Communist, or subversive organization is conclusively presumed to be within the purview of 393.2a, consideration will also be given to a person's membership in, affiliation with, or sympathetic association with any other organization, party, or movement which has been cited as subversive, Communist, Fascist, etc., by a government agency, committee, or other authoritative source.

b. Service in the governments or armed forces of enemy countries, or other voluntary activities in support of foreign governments.

c. Violations of security regulations.

d. Voluntary association with persons known or believed to be in categories a or b of section 393.2.

e. Habitual drunkenness, moral turpitude, irresponsibility, etc.

393.4 *Considerations in Weighing Evidence*

393.41 A former course of conduct or holding of beliefs shall be presumed to continue in the absence of positive evidence indicating a change, both in course of action and conviction, by clear, overt, and unequivocal acts.

393.42 If a reasonable doubt exists as to whether the person falls into one of the categories listed in section 393.2,

the Department shall be given the benefit of the doubt, and the person shall be deemed to fall into such category.

(TL: RP-35) (5-4-51)

394 *Initial Consideration and Action by the Loyalty Security Board*

394.1 *Cases Involving Loyalty and Security*

394.11 All cases in which a report of a loyalty investigation by the Federal Bureau of Investigation is received shall be referred for consideration to the Loyalty Security Board which shall take action on every case so referred. The board shall examine each report of loyalty investigation in the light of the loyalty standard set forth in section 392 and the security standard and principles set forth in section 393. After examination of the report of investigation the board may:

a. Request further investigation if such action appears to be necessary, any such request being made as specific as possible as to the additional information required; or

b. If deemed necessary or advisable to obtain information or clarification of certain matters from the officer or employee prior to reaching a conclusion as to whether the case should be closed favorably, whether charges should be made, or further investigation should be requested, give the officer or employee an opportunity, if he so desires, to answer questions by written interrogatories issued by the board, but not otherwise; or

c. Conclude that a finding clearly favorable to the officer or employee is warranted; or

d. Conclude that further processing of the case through the issuance of charges and a notice of proposed removal action is necessary.

394.12 If the Loyalty Security Board on the basis of the complete file (including the report of investigation together with the interrogatory if such was requested) reaches a clearly favorable conclusion, it shall so determine and notify the Deputy Under Secretary for ad-

ministration. If the Loyalty Security Board determines that the case does not warrant a finding clearly favorable to the individual, the procedures set forth in sections 394.13 through 394.18 and section 395 shall be followed.

(5-4-51) (TL: RP-35)

394.13 In all cases in which the Loyalty Security Board concludes that the evidence warrants further processing with a view to possible removal action, it shall serve the officer or employee with a notice in writing of the proposed removal action which shall state the nature of the charges against him in factual detail, setting forth specifically the facts and circumstances relating to the charges so far as security considerations will permit, in order to enable the employee to submit his answer, defense, or explanation. The notice shall state also that so far as the charges relate to security they may be amended within 30 days after receipt thereof.

394.14 The notice of proposed removal action shall inform the officer or employee of his right to answer the charges in writing, under oath or affirmation, together with such statements, affidavits, or other documents as as he may desire to submit within 30 calendar days from the date of receipt by the officer or employee of the notice; of his right to an administrative hearing on the charges before the Loyalty Security Board upon his request made within 15 calendar days from the date of receipt by the officer or employee of the notice of charges; of his right to appear before the Loyalty Security Board personally, to be represented by counsel or representative of his own choosing, and to present evidence by witness or affidavit in his own behalf; of his rights of appeal to the Secretary of State or his designee in the event that a decision adverse to him is made by the Loyalty Security Board, and as to the provisions governing such appeal as set forth in section 396.1.

394.15 The notice of proposed removal action given to the officer or employee shall state the employment status

in which he will be carried pending the adjudication of his case; the authority or authorities under which the notice is sent; and that the proposed removal action will not become effective in less than 30 calendar days from the date of his receipt thereof. The authorities cited for proposed removal on grounds relating to loyalty shall be Executive Order 9835 and any applicable statutes, such as section 9A of the Hatch Act and/or section 14 of the Veterans Preference Act of 1944; and for proposed removal on grounds relating to security shall be Public Law 733, 81st Congress, and General Appropriations Act, 1951, Section 1213, Public Law 759, 81st Congress.

(TL: RP–43) (9–21–51)

394.16 After giving the officer or employee the foregoing notice, the Loyalty Security Board shall proceed as follows:

a. If the officer or employee does not reply to the notice within the specified time by answering the charges in writing, the Loyalty Security Board shall consider the case on the complete file, make its determination, and notify the Deputy Under Secretary for administration. However, no inference or presumption should be assumed by the board because of the failure or refusal to reply to the notice of charges. Despite his failure or refusal to reply, the board shall furnish the officer or employee a notice of the time and place when the board proposes to consider his case, in order that he, together with his counsel or representative, may appear if he so desires. If the officer or employee does not reply to the charges but if he or his counsel or representative requests a hearing before the Loyalty Security Board as provided in section 394.14, he shall be granted such.

b. If the officer or employee answers the charges in writing but does not request a hearing as provided in section 394.14, the Loyalty Security Board shall consider the case on the complete file (including such answer), make its determination, and notify the Deputy Under Secretary for administration of its determination. Be-

fore making the determination, however, the board in its discretion may, if a hearing is deemed necessary, request the officer or employee to appear for a hearing, but the board cannot require him to appear, and no inference or presumption should be assumed by the board because of a failure or refusal of an individual to appear for a hearing.

c. If the officer or employee requests a hearing before the Loyalty Security Board as provided in section 394.14, a time and place for such hearing shall be set by the Loyalty Security Board, as convenient to the officer or employee as circumstances permit, and he shall be allowed a reasonable time to assemble his witnesses and prepare his defense, and the officer or employee shall be notified thereof in writing. Only on written request from the officer or employee shall a hearing be scheduled sooner than 15 calendar days after notice thereof to such officer or employee.

(5-4-51) (TL: RP-35)

394.17 The following statement shall be appended to each notice of charges and proposed removal action:

"Any and all evidence which you desire to submit in connection with the matter under consideration should be submitted at the hearing before the Loyalty Security Board. No additional testimony may, as of right, be introduced into the record on any subsequent appeal, and on such appeals additional testimony will be received only in exceptional circumstances and in the discretion of the appellate authority. It is therefore essential that you should take care to present all of your evidence, including your own testimony, at the hearing before the Loyalty Security Board if you wish the same to be thereafter considered in the event of an appeal."

394.18 No officer or employee shall be terminated until at least 30 calendar days subsequent to his receipt of the notice of charges, except as provided in section 22.2 (a) (2) of Civil Service Commission Regulations.

(TL: RP-35) (5-4-51)

394.2 *Cases Involving Security Only*

394.21 The Loyalty Security Board shall take action in the security cases of all officers and employees which are referred to it by the responsible authorities of the Department to determine whether such officer's or employee's removal is necessary or advisable in the interest of national security.

394.22 The Loyalty Security Board shall consider such cases in the light of the security standard and principles set forth in section 393 and may, on the basis of the record presented, make a determination in accordance with the provisions of section 394.11. The Loyalty Security Board shall then proceed as outlined in sections 394.12 through 394.18 and section 395.

394.23 The Loyalty Security Board may at any time recommend to the Deputy Under Secretary for administration the summary suspension of any officer or employee in the interest of national security and may similarly recommend the reinstatement of any officer or employee who has been summarily suspended.

394.24 Any officer or employee who is summarily suspended in the interest of national security shall be notified thereof, and informed of the reasons for his suspension to the extent that the interests of national security permit. Such officer or employee shall within 30 days after such notification be given an opportunity to submit statements or affidavits to the Loyalty Security Board to show why he should be restored to duty. Any officer or employee so suspended shall receive a written statement of the charges against him within 30 days after his suspension.

394.25 The statement of security charges may be amended at any time within 30 days after receipt thereof by the officer or employee. If the security charges are so amended the officer or employee may make written reply thereto within 30 days after receipt of the amended charges.

395 *Hearing Procedure and Decisions of the Loyalty Security Board*

395.1 *Statement of Charges and Right to Hearing and Appeal*

As indicated in section 394, before any officer or employee of the Department of State is removed from employment for disloyalty or as a security risk, he shall be provided with a statement of the charges against him, and be granted the right to an administrative hearing before the Loyalty Security Board and an appeal to the Secretary of State or his designee. If the finding of the Secretary of State on appeal is that there are reasonable grounds to believe that he is disloyal, he may appeal to the Loyalty Review Board for a determination as to his loyalty. An officer or employee may, however, be suspended at any time in the interest of national security pending a determination with respect to loyalty or security risk.

395.2 *Evidence*

The Department and employee may introduce such evidence as the Loyalty Security Board may deem proper.

395.3 *Hearings*

395.31 The hearings shall be before a panel of the Loyalty Security Board consisting of not less than three members of the board, one of whom shall be designated by the chairman of the board as chairman of the panel, and the action of the panel shall be that of the board.

395.32 The hearings shall be private and shall be attended only by the members of the panel of the Loyalty Security Board hearing the case and other appropriate departmental officials directly connected with the adjudication of the case, representatives of the Loyalty Review Board, the officer or employee, his counsel or representative, and the witness who is testifying.

395.33 The chairman of the panel shall preside; the officer or employee shall be informed of his right to appear personally and participate in the hearing, to be represented by counsel or representative of his own choice,

and either by himself or by his representative or counsel to present evidence in his own behalf, through witnesses or by affidavits. The hearing shall begin with the reading of the letter of charges and the interrogatory, if any. An introductory statement shall also be made to the effect that the transcript of the hearing will *not* include all material in the file of the case, in that it will *not* include reports of investigation conducted by the Federal Bureau of Investigation, which are confidential, nor will it contain information concerning the identity of confidential informants or information which would reveal the source of confidential evidence, but that the transcript will contain only the evidence in the letter of charges and the interrogatory, if any, and the evidence taken at the hearing.

(TL: RP-35) (5-4-51)

395.34 Testimony shall be given under oath or affirmation. Members of the panel may ask such questions of the officer or employee and his witnesses as they may desire.

395.35 A verbatim record will be made of the proceedings by a person or persons designated by the Loyalty Security Board and no other transcript shall be made. Such transcript shall be made a permanent part of the record in the case. A copy of the transcript will be provided to the officer or employee upon request.

395.36 Strict legal rules of evidence will not be applied at such hearing, but reasonable bounds shall be maintained as to competency, relevancy, and materiality.

395.4 *Consideration of Decision*

395.41 After the officer or employee has been given a hearing and after the record thereof has been reduced to writing, the panel will convene as promptly as possible in executive session to reach a decision.

395.42 In reaching its decision, the panel shall be governed by the loyalty standard provided in section 392 and/or the security standard and principles provided in section 393, as appropriate, depending on the nature of the case as set forth in the notice of charges and the

evidence submitted. After consideration of the complete file and following any desired discussion, the decision shall be by majority vote and the vote of each member shall be recorded.

395.43 In arriving at its decision, the panel shall take into consideration the fact that the employee may have been handicapped in his defense by the nondisclosure to him of confidential information or by the lack of opportunity to cross-examine persons constituting such sources of information.

(5-4-51) (TL: RP-35)

395.5 *Decision*

395.51 The decision of the panel acting for the Loyalty Security Board shall be one of the following:

a. The Loyalty Security Board determines that, on all the evidence, reasonable grounds *do not exist* for belief that the officer or employee is disloyal to the United States Government under the loyalty standard referred to in section 392, or for belief that his removal is necessary or advisable in the interest of national security under the security standard and principles referred to in section 393, and determines that the case be closed; or

b. The Loyalty Security Board determines that, on all the evidence, reasonable grounds *exist* for belief that the officer or employee is disloyal to the United States Government under the loyalty standard referred to in section 392, and for belief that his removal from employment is necessary or advisable in the interest of national security under the security standard and principles provided in section 393, and determines that he be separated from employment; or

c. The Loyalty Security Board determines that, on all the evidence, reasonable grounds *do not exist* for belief that the officer or employee is disloyal to the United States Government under the loyalty standard referred to in section 392, but reasonable grounds *exist* for belief that the officer's or employee's removal from employment is necessary or advisable in the interest of

national security under the security standard and principles provided in section 393, and determines that he be separated from employment; or

d. The Loyalty Security Board determines that, on all the evidence, reasonable grounds *do not exist* for belief that the officer's or employee's removal from employment is necessary or advisable in the interest of national security under the security standard and principles provided in section 393, and determines that the case be closed; or

e. The Loyalty Security Board determines that, on all the evidence, reasonable grounds *exist* for belief that the officer's or employee's removal from employment is necessary or advisable in the interest of national security under the security standard and principles provided in section 393, and determines that he be separated from employment.

(TL: RP–35) (5–4–51)

395.52 The decision of the Loyalty Security Board shall be made in writing and shall be signed by the members of the panel of the Loyalty Security Board deciding the case. It shall state the action taken and shall be made a permanent part of the record. In making its determination in every unfavorable loyalty case, the panel shall state in writing whether or not the case falls within the purview of section 9A of the Hatch Act and the applicable appropriation act. There shall accompany the board's decision in all cases involving loyalty (1) a memorandum showing the reasons for arriving at the favorable or unfavorable determination, and (2) a statement that the provisions of Loyalty Review Board Memorandum No. 41, Revised, to All Executive Departments and Agencies, of April 17, 1950, with respect to inviting witnesses to attend the hearing and testify, have been complied with. Such memorandum and statement shall be made a part of the confidential file, but shall *not* be a part of the written decision and shall in *no* instance be furnished to the employee or his counsel. The complete file shall be classified as confidential

and transmitted to the Deputy Under Secretary for administration.

395.53 The Loyalty Security Board may recommend the suspension of an officer or employee on loyalty grounds after a determination unfavorable as to loyalty (subsequent to the serving of a notice of proposed removal and reply, if any, and hearing, if held) except in cases where the circumstances are such that the retention of the officer or employee in an active duty status may be detrimental to the interests of the Government. In such exceptional circumstances, the board may recommend at any time that the officer or employee be temporarily assigned to duties in which this condition would not exist, or placed on annual leave, provided he has sufficient leave to his credit to cover the required period, placed on leave without pay with his consent, or suspended on loyalty grounds.

395.6 *Notification by Deputy Under Secretary for Administration*

Upon receipt of the complete file, including the decision of the Loyalty Security Board, the Deputy Under Secretary for administration will notify the officer or employee in writing of the Loyalty Security Board's decision. If the decision is favorable with respect to loyalty, and notification is given prior to post-audit by the Loyalty Review Board, such notice shall state that the loyalty determination is subject to post-audit by the Loyalty Review Board. If the decision is unfavorable, notification shall be in accordance with the provisions of section 396.11.

(5–4–51) (TL: RP–35)

396 *Appeals*

396.1 *Procedure on Appeal*

396.11 If the decision of the Loyalty Security Board requires separation from employment for disloyalty and in the interest of national security, or only in the interest of national security, the officer or employee shall be so notified in writing by the Deputy Under Secretary for administration and advised in writing of his right

to appeal to the Secretary of State or his designee in writing within 10 calendar days after receipt of such notification. If the decision of the Loyalty Security Board requires separation from employment only in the interest of national security, the notice shall state that it has been determined that on all the evidence, reasonable grounds *do not exist* for belief that the officer or employee is disloyal to the United States Government, but that the determination as to loyalty is subject to post-audit by the Loyalty Review Board.

396.12 Upon the exercise by the officer or employee of such right of appeal, the Secretary or his designee will hear the officer or employee on his appeal at a date not earlier than 1 week after receipt by the Secretary of written notice of appeal. This hearing shall be private and shall be attended only by the Secretary and/or his designee, the officer or employee, and a single counsel or representative of his own choosing. The appeal shall be on the record, but the officer or employee shall be permitted to appear personally and, either by himself or his counsel or representative, to present a statement or brief in his own behalf. No witnesses will be heard by the Secretary or his designee. A verbatim record will be made of the proceedings, and a copy of the transcript will be provided to the officer or employee upon request.

396.13 If during the course of an appeal, the Secretary of State is of the opinion that further evidence should be taken; amplification of the record should be made; or further investigation should be conducted, he may remand the case for reconsideration by the Loyalty Security Board and for such taking of further evidence; amplification of the record; or requesting of further investigation, as he may direct.

(TL: RP-35) (5-4-51)

396.2 *Favorable Decision by the Secretary of State*

396.21 If as a result of an appeal, the Secretary of State decides that reasonable grounds *do not exist* for belief

that the officer or employee is disloyal to the United States Government under the loyalty standard referred to in section 392, or for belief that his removal is necessary or advisable in the interest of national security under the security standard and principles referred to in section 393, he may direct that the case be closed.

396.22 If the Secretary of State decides that reasonable ground *do not exist* for belief that the officer's or employee's removal is necessary or advisable in the interest of national security under the security standard and principles referred to in section 393, he may direct that the case be closed.

396.23 If the decision of the Secretary of State is favorable to the officer or employee, he shall be so notified in writing. Such officer or employee shall be restored to duty, if suspended, and the record shall show such decision. In cases involving loyalty, the notice shall state that the determination as to loyalty is subject to post-audit by the Loyalty Review Board.

396.3 *Unfavorable Decision by the Secretary of State*

396.31 If as a result of an appeal, the Secretary of State decides that reasonable grounds *exist* for belief that the officer or employee is disloyal to the United States Government and for belief that his removal is necessary or advisable in the interest of national security; or that reasonable grounds *exist* for belief that the officer's or employee's removal is necessary or advisable in the interest of national security, and that he should therefore be separated from employment, the officer or employee shall be so notified in writing setting forth the authority or authorities under which he is to be terminated. Such notice shall state that the decision of the Secretary of State as to the issue of security is final.

396.32 If the decision is that reasonable grounds *exist* for belief that the officer or employee is disloyal to the United States Government and for belief that his removal is necessary or advisable in the interest of national security, such notice shall state that, so far as the

loyalty determination is concerned, the officer or employee has a right to appeal in writing to the Loyalty Review Board within 20 calendar days after the receipt of the notice in the case of persons living within the continental United States and within 30 calendar days in cases of persons living outside the continental limits of the United States.

(5–4–51) (TL: RP–35)

396.33 In the event that the officer or employee submits an appeal to the Loyalty Review Board, he shall forthwith give notice thereof to the Secretary of State.

396.4 *Action on Findings of the Loyalty Review Board*

396.41 If, on appeal to the Loyalty Review Board, that board finds that reasonable grounds *exist* for belief that the officer or employee is disloyal, the Department will take prompt administrative action to remove him from employment.

396.42 If, on appeal to the Loyalty Review Board, that board finds that reasonable grounds *do not exist* for belief that the officer or employee is disloyal, the Secretary of State may, taking into account the interest of national security:

a. Restore the officer or employee to duty, if suspended, and close the case; or

b. Terminate the employment of the officer or employee under the authority referred to in Section 391.3.

396.43 Prior to taking final action under section 396.42, the Secretary of State may refer the case to the Loyalty Security Board and obtain a recommendation whether the officer or employee should be separated from employment in the interest of national security.

(TL: RP–43) (9–21–51)

Annex 2 to defendants' motion for summary judgment

Address official communications to the Secretary of State, Washington 25, D. C.

In reply refer to SY/DLN

DEPARTMENT OF STATE,
*Washington, December 6, 1950.*

Declassified by Department of State.

MY DEAR MR. DAVIS: I am forwarding to you, by special carrier, the Department's loyalty and security file concerning Mr. John Stewart Service. You will note from the file that the Department's Loyalty Security Board, after consideration of all the evidence including that adduced pursuant to a hearing, has reached the conclusion that Mr. Service is not disloyal to the United States Government.

The Department is anxious to have this case post-audited by the Loyalty Review Board. It is therefore requested that the post-audit be conducted and the file returned to this office as soon as possible.

Sincerely yours,

D. L. Nicholson,
D. L. NICHOLSON,
*Chief, Division of Security.*

Under Separate Cover: One file (bar and lock) containing file re John Stewart Service.

Mr. Grover C. Davis, Chief, Inspection Section, Loyalty Review Board, Civil Service Commission.

Confidential

Annex 4 to defendant's motion for summary judgment

DEPARTMENT OF STATE,
*Washington, September 10, 1951.*

Address official communications to the Secretary of State, Washington 25, D. C.

In reply refer to SY/DLN.

Received Sept. 11, 1951, Loyalty Review Board, U. S. Civil Service Commission.

Declassified by Department of State.

MY DEAR MR. GREENFIELD: On March 5, 1951, the Loyalty Review Board returned to the Loyalty Security Board of this Department the loyalty file concerning John Stewart Service with the request that it be reconsidered under the loyalty standard as amended by Executive Order 10241 of April 28, 1951.

The case was reconsidered by the Loyalty Security Board on July 31, 1951. It was the unanimous decision of that Board that there is no reasonable doubt as to the employee's loyalty to the Government of the United States.

The entire file is forwarded herewith in order that it may be post-audited by the Loyalty Review Board.

The enclosed key to the file cabinet, which contains the file of Mr. Service, should be returned upon completion of the post-audit to Mr. W. Davidson Tenney, Room 602, SA–11, 515 22nd Street, N. W.

Sincerely yours,

D. L. Nicholson,
D. L. NICHOLSON,
*Chief, Division of Security.*

Attachments: Complete file on John Stewart Service. Key to file cabinet.

Mr. Raymond E. Greenfield, Chief, Inspection Section, Loyalty Review Board, Civil Service Commission.

Confidential

U. S. GOVERNMENT PRINTING OFFICE: 1956

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IN THE

# UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
For the
District of Columbia Circuit

12958 JOHN SERVICE, *Plaintiff,*

FILED FEB 10 1956

Joseph W. Stewart
CLERK

v.

John Foster Dulles ~~HIRAM BINGHAM~~, ET AL., *Defendants.*

CIVIL ACTION NO. 4967-52

## MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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# INDEX


Page

STATEMENT OF FACTS ..... 1

SUMMARY OF ARGUMENT ..... 7

ARGUMENT ..... 9

I. Plaintiff's Discharge Was Unlawful Because In Violation Of The Express Requirements Of The Foreign Service Act Of 1946 ..... 9

A. Executive Order 9835, As Amended, Could Not And Did Not Authorize A Departure From The Requirements Of The Foreign Service Act Of 1946 ..... 10

B. Plaintiff's Dismissal Was In Violation Of The Provisions Of Executive Order 9835 ..... 11

1. The Loyalty Review Board was without authority to review the favorable determination of a departmental Loyalty Security Board ..... 11

2. Plaintiff was denied his right to a fair hearing in accordance with the terms of Executive Order 9835 and was denied due process of law as guaranteed by the Fifth Amendment ..... 18

3. The Loyalty Review Board's conclusion that there was a reasonable doubt of plaintiff's loyalty is arbitrary and unreasonable because unsupported by any evidence ..... 35

4. Plaintiff was denied an opportunity to appeal to the Secretary of State from the recommendation of the Loyalty Review Board ..... 41

5. The Secretary of State made no independent determination on all the evidence that there was a reasonable doubt of plaintiff's loyalty ..... 44

6. Executive Order 9835 deprived plaintiff of his constitutional rights ..... 46

C. Plaintiff's Dismissal Was Not Validated By The McCarran Rider ..... 48

II. Plaintiff Was Unjustifiably Defamed By Defendants' Actions And The Government's Records Should Be Corrected To Eliminate The Continuing Injury Resulting Therefrom ..... 53

CONCLUSION ..... 54

## CITATIONS

CASES: Page


Addison v. Holly Hill Fruit Products, 322 U.S. 607 ..... 14
Arenas v. United States, 322 U.S. 419 ..... 48
Bailey v. Richardson, 182 F. (2d) 46 ..... 22, 23, 29, 30, 31, 47
Bauer v. Acheson, 106 F. Supp. 445, 452 (D.C., D.C. 1952) ..... 23
Biddle v. Commissioner, 302 U.S. 573, 82 L. Ed. 431 ..... 16
Bowen v. Johnston, 306 U.S. 19, 444 ..... 18
Chavez v. McGranery, 108 F. Supp. 255 ..... 23
Cook Chocolate Co. v. Miller, 72 F. Supp. 573 (D.C., D.C.) ..... 49
Crowell v. Benson, 285 U.S. 22, 62 ..... 47
Ewing v. Gardner, 88 F. Supp. 315 (S.D., Ohio, 1950) Affirmed, 185 F. (2d) 781, Modified 341 U.S. 321 ..... 14
Gonzales v. United States, — U.S. —, No. 69 Oct. Term, 1954, Decided March 14, 1955, 23 LW 4130 at p. 4132 ..... 32, 43
Gutnayer v. McGranery, 108 F. Supp. 290 ..... 23
Hammond v. Hull, 131 F. (2d) 23 (C.A. D.C. 1937), Cert. Den. 318 U.S. 777 ..... 10
Helvering v. Reynolds, 313 U.S. 428, 85 L. Ed. 1438 ..... 15
I.C.C. v. Louisville & Nashville R.R. Co., 227 U.S. 88, 93 ..... 30
Johnson v. Zerbst, 304 U.S. 458 ..... 18
Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 ..... 23, 32, 33, 34, 47, 54
Kutcher v. Gray, 199 F. (2d) 783, 788 (C.A.D.C.) ..... 13, 14, 16, 45, 46, 51
Manhattan General Equipment Co. v. Commissioner of Internal Revenue, 297 U.S. 129 ..... 14
Mastrapasqua v. Shaughnessy, 180 F. (2d) 999 (CA 2) ..... 49
Miller v. United States, 294 U.S. 435 ..... 13
N.L.R.B. v. Capital Transit Co., — App. D.C. —, — F. (2d) —, No. 12259, Decided Feb. 17, 1955 ..... 45
Perkins v. Elg, 307 U.S. 325 ..... 48, 49
Pierce v. United States, 98 Ct. Cl. 28 ..... 10
Savala-Cisneros v. Landon, 111 F. Supp. 129 ..... 23
Securities and Exchange Commission v. Chenery Corp., 318 U.S. 80, 87 ..... 45
Sheridan-Wyoming Coal Co. v. Krug, 172 F. (2d) 282, at p. 287 (C.A.D.C.) ..... 14, 52
Simmons v. United States, — U.S. —, No. 251 Oct. Term, 1954, Decided March 14, 1955, 23 LW 4127 ..... 31, 34
Thompson v. Consolidated Gas Utilities Corp., 300 U.S. 55 ..... 14
United Public Workers v. Mitchell, 330 U.S. 75 ..... 33
United States v. CIO, 335 U.S. 106 ..... 47
United States v. Harriss, 347 U.S. 612 ..... 47
United States v. L. A. Tucker Truck Lines, 344 U.S. 33 ..... 17
United States v. Nugent, 346 U.S. 1 ..... 31, 34
United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 ..... 14, 49, 50, 51, 52
Utah Power & Light Company v. United States, 243 U.S. 389 ..... 14

Page

Wendel v. Spencer, — App. D.C. —, 217 F. (2d) 858 ..... 48
Wieman v. Updegraff, 344 U.S. 183 ..... 23, 33, 34, 53
Wong Yang Sung v. McGrath, 339 U.S. 33 ..... 17
F. W. Woolworth Company v. United States, 91 F. (2d) 973, 976 (CCA 2, 1937), Cert. Den. 302 U.S. 768 ..... 16
Zacharias v. McGrath, 105 F. Supp. 421, 441 ..... 23

STATUTES:

The Foreign Service Act of 1946, Sections 637 and 638 (22 U.S.C., §§ 1007 and 1008) ..... 9, 11, 52
Section 211 (22 U.S.C. § 826) ..... 10
McCarran Rider, Public Law 188, 82nd Cong., § 103 ..... 10, 47, 48, 52, 53
Selective Service Act of 1948, 50 U.S.C. § 456(j) ..... 31

MISCELLANEOUS:

Executive Order No. 9835, 12 F.R. 1935 ..... 1, et seq.
Executive Order No. 10241, 16 F.R. 3690 ..... 1, 2, et seq.
Regulations and Procedures of the Department of State—
March 11, 1949—
§ 391.3 ..... 51
§ 392.2 f. ..... 2
§ 393.1 a. ..... 2
§ 393.1 d. ..... 2
§ 395.1 ..... 42
§ 396.11 ..... 42
§ 396.12 ..... 42, 43
§ 396.4 ..... 44, 48, 50
May 4, 1951—
§ 396.11 ..... 42
§ 396.12 ..... 42
§ 396.4 ..... 44
§ 396.41 ..... 44
Loyalty Review Board Regulation No. 14 (5 C.F.R. § 210.14) ..... 13, 14, 16
Loyalty Review Board Memorandum 32 ..... 16, 17
Griswold, "A Summary of the Regulations Problem," 54 Harv. L. Rev. 398, 401 ..... 16
Tydings Hearings—
Part 1—
p. 1351-1356 ..... 25
p. 1404 ..... 27
Part 2—
p. 1915-1916 ..... 26
p. 2456-2467 ..... 24
p. 2466 ..... 19
p. 2462-2464 ..... 28

In The

# UNITED STATES DISTRICT COURT

For The District of Columbia

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John Service,
*Plaintiff,*

v.

Hiram Bingham, et al.,
*Defendants.*

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**CIVIL ACTION NO. 4967-52**

---

## MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This is a Motion for Summary Judgment by the plaintiff pursuant to Rule 56. Plaintiff contends that he is entitled to such Judgment as a matter of law.

## STATEMENT OF FACTS

The plaintiff was removed from his position as a Class 2 Officer in the Foreign Service on December 13, 1951, pursuant to an opinion of the President's Loyalty Review Board.

The Loyalty Review Board purported to act pursuant to Executive Order No. 9835, 12 F. R. 1935, as amended by Executive Order No. 10241, 16 F. R. 3690.

Previously charges had been preferred against the plaintiff under the so-called Loyalty and Security Programs. These charges were contained in a letter dated March 24, 1950, directed to the plaintiff from Conrad E. Snow, Chairman of the Loyalty Security Board of the Department of State. (Complaint, Exhibit C.) The charges were:

> "The specific charges are that within the meaning of Section 392.2.f of Regulations and Procedures of the Department of State, you are a member of, or in sympathetic association with, the Communist Party which has been designated by the Attorney General as an organization which seeks to alter the form of government of the United States by unconstitutional means; and further that within the meaning of Section 393.1.d of said Regulations and Procedures you are a person who has habitual or close association with persons known or believed to be in the category set forth in Section 393.1.a of said Regulations and Procedures to an extent which would justify the conclusion that you might through such association, voluntarily or involuntarily, divulge classified information without authority."

Exhaustive hearings were held on these charges and, on October 6, 1950, the Loyalty Security Board of the Department of State found and concluded on the basis of all the evidence:

1. That reasonable grounds did not exist for the belief that the plaintiff was disloyal to the United States, and

2. That he did not constitute a security risk to the Department of State.

These findings were accepted and confirmed on or about December 6, 1951, by the Deputy Under Secretary of State, acting for the Secretary of State. On April 28, 1951, Executive Order 10241, 16 F.R. 3690, amended the standards for removal from employment in loyalty cases. The Loyalty Security Board again considered the plaintiff's case under the stricter standards of the new executive order

and, on July 31, 1951, "determined that no reasonable doubt exists as to his loyalty to the United States Government."

Despite the fact that Executive Order No. 9835 contained no provision for review of determinations made by the departmental loyalty boards which were favorable to the employee involved, the Loyalty Review Board undertook to review plaintiff's case on a "post-audit" procedure.

A panel of this Loyalty Review Board held a hearing on November 8, 1951. At this hearing, the panel of the Loyalty Review Board concerned itself with a charge quite different from that preferred against plaintiff by the State Department Loyalty Security Board and against which he had successfully defended himself at hearings covering 15 days of testimony. This new charge was one under Part V, Section 2, d. of Executive Order No. 9835. This paragraph provided, in effect, that among the activities of a Government employee which might be considered in connection with disloyalty determinations was included,

> "Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States;"

This charge had not been considered as such by the departmental Loyalty Security Board in its previous considerations of plaintiff's case. In order to avoid once more referring the case to the departmental Board for still another hearing, it was stipulated between the plaintiff's counsel and the Chairman of the Loyalty Review Board that this new specification might be treated as if it had been contained in the original charges preferred against the plaintiff and disposed of by the departmental Board favorably to plaintiff. (Complaint, Exhibit F.)

This added specification was the sole basis upon which the Loyalty Review Board relied in "reversing" the

favorable finding of the State Department Board (Complaint, Exhibit A).

On December 13, 1951, defendant Bingham, Chairman of the Loyalty Review Board, transmitted to the Secretary of State the opinion of the Loyalty Review Board purporting to "reverse" the favorable finding of the Loyalty Security Board of the Department of State (Complaint, Exhibit A, last paragraph), and requested the Secretary to "Please advise the Loyalty Review Board of the effective date of the removal of * * *" plaintiff. (Complaint, Exhibit G, last paragraph.) The Loyalty Review Board expressly found that plaintiff's conduct while on assignment in China raised no reasonable doubt concerning his loyalty; that no such doubt concerning plaintiff's loyalty arose from his activities while assigned to the Staff of General MacArthur in Tokyo; and that "There is no evidence * * * that the employee was ever a member of the Communist Party or any other organization on the Attorney General's list." The sole ground upon which the Loyalty Review Board concluded that a reasonable doubt existed as to plaintiff's loyalty was his conversations with Philip Jaffe of New York, the Editor of *Amerasia,* after plaintiff's return from China on April 19, 1945, and up to the time of his arrest in connection with the Amerasia case on June 6, 1945.

Within four hours of his receipt of this communication from defendant Bingham, the Secretary of State caused the Deputy Under Secretary of State to terminate plaintiff's employment, by letter, stating that the Department had acted under the "authority of Executive Order No. 9835, as amended, and Section 103 of Public Law 188, 82nd Congress." (Service Affidavit, Annex 1.)

At the same time, the Secretary of State issued a public statement, State Department Press Release No. 1088 (Complaint, Exhibit H) stating, *inter alia,* that on the question whether there was a reasonable doubt as to plaintiff's

loyalty, "* * * the State Department Board was reversed" (Exhibit G, antepenultimate paragraph) and concluding:

> "The Chairman of the Loyalty Review Board has requested the Secretary of State to advise the Board of the effective date of the separation of Mr. Service. This request stems from the provisions of Executive Orders 9835 and 10241—which established the President's Loyalty Program—and the Regulations promulgated thereon. These Regulations are binding on the Department of State.
>
> "The Department has advised the Chairman of the Loyalty Review Board that Mr. Service's employment has been terminated."

Immediately upon receipt of advice from defendant Bingham of the action of the Loyalty Review Board panel, plaintiff and his counsel sought to confer with the Deputy Under Secretary of State and finally obtained an interview with him at about 6 p.m. on December 13, 1951. At this interview, plaintiff and his counsel requested the Deputy Under Secretary of State to withhold action in response to the action of the Loyalty Review Board so that plaintiff might appeal to the Secretary of State. But opportunity to do so was denied. Plaintiff was advised that the Loyalty Review Board's determination that there was a reasonable doubt as to plaintiff's loyalty was binding on the State Department, that plaintiff's dismissal was mandatory and that the press had been notified of the availability of a mineographed public statement by the Secretary of State to that effect.

Thereafter, plaintiff's counsel made further specific inquiry as to the precise basis for plaintiff's discharge and, by letter dated December 27, 1951, the Deputy Undersecretary replied as follows (Service Affidavit, Annex 2):

> "My dear Mr. Service:
>
> "Reference is made to the Department's letter to you, dated December 13, 1951, wherein you were advised that your employment in the Foreign Service

of the United States was to be terminated as of the close of business December 14, 1951.

"Mr. C. E. Rhetts, your attorney, called and requested that the Department clarify its letter to you, particularly with respect to the reason or reasons for the termination of your services.

"As stated in the first paragraph of the letter under reference, the Secretary was advised by the Chairman of the Loyalty Review Board of the United States Civil Service Commission that the Loyalty Review Board has found that there is a reasonable doubt as to your loyalty to the Government of the United States and that this finding was based on the intentional and unauthorized disclosure of documents and information of a confidential and non-public character within the meaning of subparagraph d of paragraph 2 of Part V of Executive Order 9835, as amended. Upon receipt of the Loyalty Review Board's decision, the Secretary directed that your employment in the Foreign Service of the United States be terminated as of the close of business December 14, 1951.

"In view of your attorney's request for a clarification, this is to advise that your employment was terminated solely as a result of the aforementioned finding of the Loyalty Review Board of the United States Civil Service Commission.

"Sincerely yours,

"For the Secretary of State:

"CARLISLE H. HUMELSINE,
*"Deputy Under Secretary."*

On December 20, 1951, plaintiff filed with the Loyalty Review Board a "Motion to Vacate and Reconsider Decision" of December 13, 1951. (Exhibit J to the original Complaint herein.) This Motion was based not merely upon plaintiff's substantive case, but upon the contention that the Loyalty Review Board was completely without authority under Executive Order 9835, as amended, to "reverse" a determination by the departmental Loyalty Security Board favorable to plaintiff. This Motion was "duly considered by the Loyalty Review Board under its proce-

dures'' and was denied on January 7, 1952. (Exhibit K to the original Complaint herein.)

On the same day, plaintiff sought to obtain a further review of the Loyalty Review Board's action by the Civil Service Commission. On April 1, 1952, the Civil Service Commission declined to act, upon the grounds that it was without jurisdiction to control the actions either of the Secretary of State or the Loyalty Review Board, noting that plaintiff, a Foreign Service Officer, was ''* * * in a service in which the employment and dismissal of persons is within the exclusive province of the Secretary of the Department of State.'' (Exhibit M to the original Complaint.)

Plaintiff then filed the original Complaint in this action, to which were appended numerous exhibits which will be referred to in this brief as matters of record. This Complaint and two amended complaints were stricken by the Court and in its present posture plaintiff's case depends upon the third amended complaint, filed on October 20, 1953, to which the Government filed answer on November 30, 1953, admitting some allegations and denying others. Certain requests for admissions were made, upheld by the Court, and the requested facts admitted by the Government. On February 14, 1955, the pre-trial conference was held, for which both plaintiff and defendant filed statements of fact. Affidavits have been filed by plaintiff in support of this Motion. Thus, this Motion depends for its factual basis on the unchallenged allegations of the third amended complaint, upon the admissions of the Government pursuant to request, upon Defendants' Pre-Trial Statement and upon the affidavit of plaintiff. Upon these bases, plaintiff contends that he is entitled to judgment as a matter of law.

## SUMMARY OF ARGUMENT

I. Plaintiff will show that his discharge from employment as a Foreign Service Officer was in violation of the express requirements of The Foreign Service Act of 1946,

and that neither of the sources of authority relied upon by the Secretary of State suffice to sustain his discharge.

*The President's Loyalty Order, Executive Order No. 9835,* did not even purport to and could not authorize the disregard of the provisions of the governing statute. In any case, plaintiff's discharge was not effected in accord with the provisions of that Order. The Loyalty Review Board, which found there was a reasonable doubt of plaintiff's loyalty, had no authority under the Executive Order to review the findings of the Secretary of State favorable to plaintiff. The Loyalty Review Board's findings were based wholly on information allegedly furnished by plaintiff to one Philip Jaffe in conversations in Jaffe's hotel room, which conversations were recorded by the F.B.I. Since the fact of such recordings was known to plaintiff, no considerations of national security warranted the withholding of such recordings from plaintiff. At the very least, he should have been given a fair resume of his alleged conversations so that he could explain and correct them. The failure to supply such original recordings or a fair resume of them deprived plaintiff of a fair hearing as required by the Executive Order and by the Fifth Amendment. The Loyalty Review Board's conclusion as to plaintiff's doubtful loyalty was arbitrary and unreasonable because unsupported by evidence. Although plaintiff sought an opportunity to do so, he was denied an appeal to the Secretary of State prior to his discharge, as required by the Executive Order and the Regulations of the Secretary. The Secretary of State made no independent determination on all of the evidence that there was a reasonable doubt as to plaintiff's loyalty, as he was required to do by the Executive Order. In any case, the Executive Order denied plaintiff his constitutional rights.

*The McCarran Rider* conferred upon the Secretary authority to terminate the employment of officers of the Foreign Service "in his absolute discretion." In plaintiff's case, however, the Secretary failed to exercise the discre-

tion required of him by the McCarran Rider, having bound himself by regulation issued in advance to automatically discharge any employee against whom the Loyalty Review Board made unfavorable recommendation. In any case, the Secretary had by regulation imposed limitations on his exercise of his McCarran Rider powers and had accorded to plaintiff the procedural guarantees of Executive Order 9835 in the exercise of the McCarran Rider authority. Since plaintiff was denied those guarantees, his discharge may not be justified under the McCarran Rider. Accordingly, plaintiff's discharge was unlawful and he should be ordered restored to his position.

II. Apart from the validity of plaintiff's discharge and his right to reinstatement, he was unjustifiably defamed by the publication of the Loyalty Review Board's unauthorized decision that there was a reasonable doubt of his loyalty. Being unauthorized by the Executive Order, the Loyalty Review Board opinion cannot be justified as an official act and the Secretary of State and the Civil Service Commission should be ordered to withdraw the unauthorized defamatory publication and expunge from the Government's records this defamatory material.

## ARGUMENT

### I. Plaintiff's Discharge Was Unlawful Because In Violation Of The Express Requirements Of The Foreign Service Act Of 1946.

Plaintiff was an officer in the Foreign Service. The Foreign Service Act of 1946 sets forth detailed provisions governing the separation of Foreign Service officers from the Service. Sections 637 and 638 (22 U.S.C., §§1007 and 1008) govern separations "for unsatisfactory performance of duty" and "for misconduct or malfeasance," respectively. Both sections authorize the Secretary of State to separate officers but both sections provide:

> "* * * but no such officer shall be so separated from the Service until he shall have been granted a hearing by the Board of the Foreign Service * * *"

and the officer's unsatisfactory performance of duty or his misconduct has been established at that hearing. Cf. *Hammond* v. *Hull,* 131 F. (2d) 23; (C.A. D.C. 1937), cert. den. 318 U.S. 777; *Pierce* v. *United States,* 98 Ct. Cl. 28.

Plaintiff was never accorded a hearing before the Board of the Foreign Service. This Board, created by Section 211 of the Act (22 U.S.C. § 826), is by statute composed of the Assistant Secretary of State in Charge of Administration, two other Assistant Secretaries of State to be designated by the Secretary, the Director General of the Foreign Service, and representatives of the Departments of Agriculture, Commerce, and Labor.

Plainly, the Loyalty Review Board has no standing under this statute and it cannot be contended that the express requirements of the Foreign Service Act governing separations have been complied with.

In his letter of December 13, 1951, terminating plaintiff's employment, the Deputy Under Secretary of State asserted that "* * * the Secretary of State, under the authority of Executive Order 9835, as amended, and Section 103 of Public Law 188, 82nd Congress, has directed me to terminate your employment in the Foreign Service * * *".

We turn now to a showing that plaintiff's discharge was not effected in accordance with either the Executive Order or Public Law 188, § 103, and that, therefore, neither can operate to justify the disregard of the protections afforded plaintiff by the Foreign Service Act.

### A. Executive Order 9835, As Amended, Could Not And Did Not Authorize A Departure From The Requirements Of The Foreign Service Act Of 1946.

At the outset, it is evident that a complete disregard of the detailed statutory provisions of the Foreign Service

Act of 1946 could not in any event be authorized by a mere executive order.

In point of fact, Executive Order 9835, as amended, makes no reference to the Foreign Service Act and does not even purport to authorize anyone to discharge any employee. Consequently, reliance on this Executive Order as a justification for disregard of the Foreign Service Act is plainly misplaced.

## B. Plaintiff's Dismissal Was In Violation Of The Provisions Of Executive Order 9835.

We here show that the action of the Secretary of State and the Loyalty Review Board wholly failed to comply with the requirements of Executive Order 9835, as amended, and that for this independent reason plaintiff's discharge can draw no support from this source.

### 1. The Loyalty Review Board was without authority to review the favorable determination of a departmental Loyalty Security Board.

The Loyalty Review Board was a creature of the President, established by Executive Order 9835. The Board possessed no statutory authority and every power which it exercised must be discovered within the four corners of the Executive Order.

That portion of the Executive Order which dealt with the Loyalty Review Board itself was contained in Part III. Section 1 of Part III established the Board and defined its powers. Paragraph a., of Part III, Section 1, defined the Board's appellate authority in the following terms:

> "The Board shall have authority to review cases involving persons recommended for dismissal on grounds relating to loyalty by the loyalty board of any department or agency and to make advisory recommendations thereon to the head of the employing de-

partment or agency. Such cases may be referred to the Board either by the employing department or agency, or by the officer or employee concerned."

The Loyalty Security Board of the State Department never recommended that plaintiff be dismissed. Consequently, his case was not one of those which "the Board shall have authority to review."

Part II, Section 3 of Executive Order No. 9835, provided that a recommendation of removal by a departmental loyalty board should be subject to appeal by the officer or employee affected to the agency head or his designated representative; and if that determination were adverse, then to further appeal to the Loyalty Review Board "for an advisory recommendation."

Thus, it was plainly contemplated throughout Executive Order 9835 that appellate consideration of recommendation cases was to be had only when sought by the employee or the employing Department and not at the instance of the Loyalty Review Board.

At the outset, therefore, it is clear that no specific authority to review plaintiff's case was conferred upon the Loyalty Review Board by Executive Order 9835. On the contrary, Part III of this Order confined the appellate authority of the Loyalty Review Board to "cases involving persons recommended for dismissal * * *" If the President had desired to confer a broader authority upon the Loyalty Review Board, it would have been easy for him to do so simply by using the words "Federal employees" in place of the words "persons recommended for dismissal."

Nevertheless, and despite the language of Executive Order No. 9835, the Loyalty Review Board reached out to obtain for itself power not conferred upon it by the President.

Paragraph (b) of Part III, Section 1, authorized the Board to make rules and regulations deemed necessary

to implement statutes and executive orders relating to employee loyalty. This power, however, was limited by the specific requirement that such rules and regulations should be "not inconsistent with the provisions of this Order * * *"

The Board issued certain regulations, which are to be found in 5 C.F.R., Chap. 210. Regulation No. 14 (5 C.F.R. § 210.14)—which, it must be remembered, was issued not by the President but by the Board itself—purported to authorize the Loyalty Review Board,

> "* * * to call up for review any determination or decision made by any Department or Agency Loyalty Board * * * or by any head of an employing Department or Agency, even though no appeal has been taken * * * the panel, * * * may affirm the determination or decision, or remand the case with appropriate instructions * * * In exceptional cases * * * the panel may hold a new hearing in the case and after such hearing, affirm or reverse the determination or decision."

This was plainly an effort by the Board to utilize the bootstrap method of increasing its own powers. Had the Board thought additional power to be necessary, the proper avenue was to request the President to amend the Order. Instead, the Board attempted to hack out a fatally defective shortcut. The Regulation, purporting to authorize more inclusive appellate review powers than those which the President had conferred upon the Board was, undoubtedly, "inconsistent with the provisions of this Order * * *" Cf. *Kutcher* v. *Gray,* 199 F. (2d) 783, 788 (C.A. D.C.)

In marking out the limits of delegated power, the Supreme Court has consistently held to the line that the creature cannot rise above its creator; and that any administrative regulation or determination which exceeds the authority conferred upon the agency is null and void.

This principle was forcibly enunciated in *Miller* v. *United States,* 294 U.S. 435, where the Court struck down a regula-

tion of the Veterans Administrator, with reference to the definition of "total disability" for insurance purposes. Speaking of the challenged regulations, the Supreme Court held, at pages 439-40:

> "It is not, in the sense of the statute, a regulation at all, but legislation * * * The only authority conferred * * * by the statute is to make regulations to carry out the purposes of the Act—not to amend it."

To the same effect are *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue,* 297 U. S. 129; *Addison* v. *Holly Hill Fruit Products,* 322 U. S. 607; *Thompson* v. *Consolidated Gas Utilities Corporation,* 300 U. S. 55; *Utah Power & Light Company* v. *United States,* 243 U. S. 389; *Ewing* v. *Gardner,* 88 F. Supp. 315 (S.D. Ohio, 1950), affirmed 185 F. (2d) 781, modified 341 U.S. 321.

Indeed, the courts have in a good many cases gone further and held that an administrative agency cannot, customarily speaking, depart from its own regulation in specific cases. *United States ex rel. Accardi* v. *Shaughnessy,* 347 U.S. 260; *Sheridan-Wyoming Coal Co.,* 172 F. (2d) 282 (C.A.D.C.).

If an administrative agency cannot depart from its own regulations in specific cases, then, *a fortiori,* it cannot depart from the regulations prescribed for it by its creator, whether executive or legislative.

It seems clear beyond challenge that the President, in establishing the Loyalty Review Board, contemplated a system of appellate review in which the Loyalty Review Board would act only in cases where the employee felt aggrieved by an adverse decision at the departmental level.

The Board's Regulation No. 14 contemplated and established an entirely different system of appellate review, which was inconsistent with that which the President set up. There being a conflict, the power of the President must prevail and the claims of the overreaching subordinate must be struck down for lack of legal basis. *Kutcher* v. *Gray, supra.*

There remains only the flimsy argument that the President, by amending Executive Order No. 9835 on April 28, 1951, subsequent to the promulgation of Regulation No. 14, thereby ratified the erroneous and overreaching construction which the Loyalty Review Board had placed upon its own powers. This amendment, embodied in Executive Order No. 10241, was a very brief one and related solely to a change in the so-called "reasonable doubt" standard by which various agencies and boards were to judge the loyalty of an employee.

The amendment did not in any respect deal with Part III of the original Executive Order, which established the Loyalty Review Board and defined its jurisdiction. In no manner did it touch upon the procedural aspects of loyalty cases, the appellate jurisdiction of the Loyalty Review Board, or the relationship between that Board and the departmental Loyalty Security Boards.

Thus, in this case, it is not proper to indulge the sometimes strained assumption that the President of the United States, in amending one portion of his original Executive Order, intended or desired to ratify and confirm every error of law which the Loyalty Review Board had committed since its inception.

Courts have held with a high degree of consistency that the doctrine of legislative ratification of an administrative construction, or of a rule or regulation, does not apply where the challenged action is palpably inconsistent with statute law (or, in this case, with the Executive Order).

At best, the so-called rule of law which implies a legislative (or, in this case, an executive) approval of administrative regulations or interpretations by virtue of a reenactment of a statute "is no more than an aid in statutory construction." *Helvering* v. *Reynolds,* 313 U. S. 428, 85 L. Ed. 1438.

When the courts believe that statutory language is so plain as to require a particular interpretation, then the reenactment doctrine is rejected: "Where the law is plain

the subsequent reenactment of a statute does not constitute the adoption of administrative construction." *Biddle* v. *Commissioner,* 302 U. S. 573, 82 L. Ed. 431.

Moreover, there is no information of the character ordinarily used in aid of judicial inquiry to justify the belief that the President in amending and repromulgating Executive Order 9835 was advised of the regulations issued by the Loyalty Review Board, or advised of the fact that there was any question of inconsistency between the prior Executive Order and any of the Board's regulations.

The words of Judge Learned Hand are as applicable to the President in this case as they were to Congress of which he spoke: "To suppose that Congress must particularly correct each mistaken construction under penalty of incorporating it into the fabric of the statute appears to us unwarranted * * *" *F. W. Woolworth Company* v. *United States,* 91 F. (2d) 973, 976 (CCA 2, 1937), cert. den. 302 U. S. 768.

It is clear that in the case now before the Court the regulation adopted by the Loyalty Review Board, with reference to its appellate jurisdiction, was not only without support in the Executive Order, but directly contrary to its terms. In no sense can the regulations adopted by the Loyalty Review Board be deemed an interpretative regulation. If it had been adopted by a statutory rather than an executive creature the regulation would clearly have been deemed legislative in character, and it may be doubted whether the reenactment doctrine in any of its aspects is applicable to a regulation of this character. See *Griswold,* "A Summary of the Regulations Problem," 54 Harvard Law Review 398, 401.

Finally, the situation with respect to this defective Regulation No. 14 is in all respects identical with the situation with respect to the Loyalty Review Board's fatally defective Memorandum 32 which was involved in *Kutcher* v. *Gray, supra.* And the amendment by Executive Order

10241 will no more save Regulation 14 than it did Memorandum 32.

Plaintiff's objection to the jurisdiction of the Loyalty Review Board was properly and seasonably made. The Supreme Court stated in *United States* v. *L. A. Tucker Truck Lines,* 344 U. S. 33,

> "We have recognized in more than a few decisions, and Congress has recognized in more than a few statutes, that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts * * * Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not trouble over administrative decisions unless the administrative body not only has erred but has erred against objections made at the time appropriate under its practice."

In this case, the Loyalty Review Board's erroneous assumption of jurisdiction was not only an error but an error which permeated the entire proceeding and went to the vitals of the case. Long before instituting this action, plaintiff filed with the Loyalty Review Board a Motion to Vacate and Reconsider its adverse decision upon the specific ground that it lacked jurisdiction to reverse the favorable finding of the departmental Loyalty Security Board. This Motion was "duly considered by the Loyalty Review Board under its procedures and * * * denied."

Hence, it is clear that plaintiff's objection to the Loyalty Review Board's jurisdiction was timely made and was considered by the Board on its merits. That being the case, the Board's jurisdiction is open to attack in this forum. Cf. *Wong Yang Sung* v. *McGrath,* 339 U.S. 33.

The stipulation between the defendant, Bingham, Chairman of the Loyalty Review Board, and plaintiff's counsel did not in any sense constitute a consent to or an accept-

ance of the Loyalty Review Board's jurisdiction to "reverse" the action of the departmental Loyalty Board favorable to him. This stipulation was entered into because of the fact that, in the hearing before the Loyalty Review Board, evidence had been taken as to whether plaintiff had made unauthorized disclosures of confidential or nonpublic information. This evidence had raised a question as to a new charge or specification against the plaintiff which had not been considered as such by the departmental Loyalty Security Board. In order to avoid further delay, plaintiff's counsel simply stipulated that the Loyalty Review Board might consider the case "as if the original letter of charges * * * contained the * * * specification * * *" The stipulation had no relationship to and did not deal with the question of the Loyalty Review Board's appellate jurisdiction. It should be noted that this stipulation also provided "that the case before this Board should be considered as if the Department of State Board had made a determination that no reasonable doubt of Service's loyalty exists * * *" Accordingly, the stipulation did not in any way affect the authority of the Loyalty Review Board under Executive Order 9835 to review and reverse a finding favorable to plaintiff. Indeed, it is doubtful whether, in the complete absence of any jurisdiction by the Loyalty Review Board to consider the case, the plaintiff could have conferred such jurisdiction even by explicit consent. Cf. *Johnson v. Zerbst,* 304 U. S. 458; *Bowen* v. *Johnston,* 306 U.S. 19.

**2. Plaintiff was denied his right to a fair hearing in accordance with the terms of Executive Order 9835 and was denied due process of law as guaranteed by the Fifth Amendment.**

In making its adverse determination as to plaintiff's loyalty, the Loyalty Review Board's sole reliance was upon certain alleged unauthorized disclosures of information said to have been made by the plaintiff to one Philip Jaffe. (An-

swer, Para. 29; Defendants' Pre-Trial Statement, p. 5.) This incident was made the basis for the specification or charge added by stipulation after the hearing before the Loyalty Review Board.

Except for the plaintiff's own testimony, the only evidence relied upon by the Loyalty Review Board consisted of certain purported digests or summaries of conversations between the plaintiff and Jaffe, at Jaffe's hotel room in Washington, on April 19 and 20, 1945, and on May 8 and 29, 1945. (Defendant's Admissions in response to plaintiff's request therefor, filed on October 22, 1954, herein called "Admissions.") These purported digests and summaries were furnished to the Loyalty Review Board by the Federal Bureau of Investigation. Agents or employees of the F.B.I., through recording devices, made records of these conversations; but it is admitted that neither the recordings themselves nor any exact transcription of them was made available to the Loyalty Review Board or to the plaintiff. (Admissions; Tydings Hearings, Part 2, p. 2457.)[1] The record of the hearing before the State Department's Loyalty Security Board shows that plaintiff's counsel requested that such recordings or exact transcriptions of them should be made available, but that the request perforce was refused. (Tydings Hearings, Part 2, p. 2466.) Moreover, even the digests furnished by the F.B.I. to the Loyalty Boards were withheld from plaintiff except to the very limited extent that portions of these materials were re-

[1] Plaintiff was furnished one copy of the transcript of his hearing before the State Department Loyalty Security Board. While his hearings were in progress before the State Department Board, a Sub-Committee of the Committee on Foreign Relations of the United States Senate was holding hearings on S. Res. 231, a resolution to investigate whether there are employees in the State Department disloyal to the United States. In due course, the plaintiff appeared and testified before this Sub-Committee, herein called "Tydings Subcommittee" and furnished to it his only copy of the transcript on his State Department loyalty hearing This entire transcript was eventually published in Part 2 of the Hearings published by the Tydings Subcommittee, herein referred to as "Tydings Hearings."

vealed as a result of questions asked him by various members of the Loyalty Boards.

Nevertheless, and despite the unavailability of the best evidence, the decision of the Loyalty Review Board (Complaint, Exhibit A) conclusively indicates that the Board relied wholly upon these conversations in making its adverse determination. (Defendants' Pre-Trial Statement, p. 5.) Without this information, or to be more accurate, without some anonymous summarizer's idea of this information, the Board could not and would not have made its adverse determination.

The questions must be answered whether it was lawful, either under the Executive Order or under the due process clause of the Fifth Amendment, (1) to withhold the best evidence of these conversations, i.e., the actual recordings or exact transcriptions of them, not only from plaintiff but from the triers of fact who sat in judgment on him and (2) to withhold from plaintiff even the digests and summaries of these conversations which were furnished to the Loyalty Boards and on which the Loyalty Review Board relied so heavily in reaching its adverse judgment. Both questions must be answered in the negative.

Executive Order No. 9835 provides in Part II, Section 2, a., that an officer or employee charged with disloyalty "shall have a right to an administrative hearing. * * *" In Part II, Section 2, b., it is required that the accused employee or officer

> "shall be informed therein of the nature of the charges against him in sufficient detail, so that he will be enabled to prepare his defense. The charges shall be stated as specifically and as completely as, in the discretion of the employing department or agency, security considerations permit * * *"

The Order further provides in Part IV, Section 1, that

> "At the request of the head of any department or agency of the executive branch an investigative agency

> shall make available to such head, personally, all investigative material and information collected by the investigative agency concerning any employee or prospective employee of the requesting department or agency or shall make such material and information available to any officer or officers designated by such head and approved by the investigative agency."

Part IV, Section 2, of the Executive Order permits the investigative agency to withhold the names of confidential informants under certain circumstances but forbids the names of such informants to be withheld "where such action is not essential."

Clearly, complete information as to the conversations between the plaintiff and Jaffe was withheld from the Loyalty Security Board and from the Loyalty Review Board, as well as from the plaintiff. This, the Government now admits. On the basis of the Government's admissions, it may be stated flatly that no confidential informant was involved, since the Government admits that no information, other than the purported digests or summaries of the recorded conversations and the plaintiff's own testimony, was available either to the Loyalty Security Board or to the Loyalty Review Board.

Part IV, § 1, of the Executive Order expressly directs investigating agencies, at the request of the head of any department or agency of the executive branch, to make available to such head or his designees "* * * all investigative material and information collected by the investigative agency concerning any employee * * *" Plaintiff alleged (Complaint, Para. 28) that neither the Secretary of State nor the Loyalty Review Board requested the F.B.I. to make available to them the original recordings of plaintiff's conversations with Jaffe and the testimony of the persons who prepared the purported transcripts and digests of such conversations. Defendants have denied this allegation (Answer, Para. 28). Accepting their denial, it is evident that the withholding of this vital information

from his judges, as well as from plaintiff, violated the provisions of the Executive Order. There being no confidential informants involved, it is plain that the exceptions provided in Part IV, § 2, are not here applicable.

Therefore, there can be no argument in this case, as there was in *Bailey* v. *Richardson,* 182 F. (2d) 46, that information must be withheld for the protection of confidential informants and to preserve the integrity of the Government's security program. Here, there is no basis for withholding this evidence save a reluctance to have its probative value tested by legal process. The refusal of the Government at all stages of this proceeding to make this essential evidence available, either to the Boards or to the plaintiff, is contrary to the whole spirit and letter of the Executive Order, which evidences throughout the provisions quoted above a policy of making available all information and all evidence except where some interest, deemed vital to the Government and to the national security, would be injured or impaired.

The Government has heretofore argued,[2] and presumably will again, that it is without significance that no "confidential informants" were involved in this case; that "* * * the degree of specificity of the charges given the employee is 'a wholly discretionary matter' with the agency * * *"[3] and that agency boards may in all circumstances act upon "* * * secret evidence not disclosed to the employee * * *"[4]

For this sweeping proposition, the Government relies on that portion of Part II, Section 2, b., of the Executive Order which requires that the charges "* * * be stated as specifically and completely as, in the discretion of the * * * department * * * security considerations permit * * *" and on the Court of Appeals' statement in *Bailey* v. *Rich-*

[2] See "Memorandum of Points and Authorities In Support of Defendants' Objections To Plaintiff's Request for Admission." pp. 2-4.

[3] Memorandum cited in Note 2, p. 3.

[4] Memorandum cited in Note 2, p. 4.

*ardson,* 182 F. (2d) 46, 52, that this provision "* * * leaves specificity a wholly discretionary matter * * *" But this foundation is wholly insufficient to support the Government's sweeping conclusion. The fact that the matter of specificity is "wholly discretionary" is not to say that it is left to the irrational whim of the employing department. Rational considerations of national security may or may not dictate withholding of the identity of confidential informants. But no rational considerations of any kind afford any support for withholding the exact contents of information obtained from a source (i.e., recording devices) after the Government itself has revealed the existence and the identity of the source, i.e., that it utilized such recording devices to record conversations. Even the most generous concept of administrative "discretion" is bounded by the requirement of reasonableness. "This Court is not willing to subscribe to the view that the executive power includes any absolute discretion which may encroach on the individual's constitutional rights, or that the Congress has power to confer such absolute discretion." *Bauer* v. *Acheson,* 106 F. Supp. 445, 452 (D.C. D.C., 1952); *Wieman* v. *Updegraff,* 344 U.S. 183, 192; Cf. *Chavez* v. *McGranery,* 108 F. Supp. 255; *Gutnayer* v. *McGranery,* 108 F. Supp. 290; *Savala-Cisneros* v. *Landon,* 111 F. Supp. 129; *Zacharias* v. *McGrath,* 105 F. Supp. 421, 441. Cf. *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123.

Secrecy for the sake of security may be within the bounds of reason and, hence, within the realm of permissible administrative discretion. Such is the teaching of *Bailey* v. *Richardson, supra.* But secrecy merely for the sake of secrecy is another matter, wholly beyond the bounds of reason; it is arbitrary and whimsical and not protected by the mantle of "administrative discretion."

In the present case, no security consideration can have warranted the withholding from plaintiff of the original recordings of the conversations between him and Jaffe, upon

which the Loyalty Review Board relied exclusively in arriving at its unfavorable judgment.

Finally and quite apart from the foregoing, no security consideration could warrant withholding from plaintiff the summaries, digest, and characterizations of the actual conversations, by whomever made, which were all that was before either of the triers of fact.

The most elementary conceptions of an administrative hearing would obviously require that plaintiff have an opportunity to refute or explain such reports and digests of purported conversations if reliance is to be placed on the content of such reports in so important a matter.

Defendants' Admissions make it clear that no confidential informant was involved in this case. All that was involved was digests of recordings made by secreting in Jaffe's hotel room a microphone and the recording of conversations picked up by that microphone. The only feature of this process which could conceivably be of concern as a security matter was the revelation of the fact that such a device had been used. It could be argued that the revelation of this fact might tend to make people more cautious in the future about holding conversations in hotel rooms and, thus, might tend to dry up this source of information to the F.B.I. But, even if this could be thought to be in some circumstances a proper security consideration, within the meaning of Part II, Section 2, b., of the Executive Order, it clearly could not be such in the circumstances of this case.

The first occasion on which plaintiff was questioned about his hotel room conversations with Jaffe in the course of his loyalty hearings was before the State Department Loyalty Security Board on June 24, 1950. (Tydings Hearings, Part 2, pp. 2456-2467.) On the preceding day, June 23, 1950, it had been announced in the public press that the F.B.I. had made recordings of conversations between Jaffe and plaintiff in Jaffe's hotel room and, in the course of plaintiff's appearance before a public session of the Tydings

Subcommittee, it was evident that such a recording had in fact been made. (Tydings Hearings, Part 1, pp. 1351-1356.) Since the Loyalty Security Board's determination was favorable to plaintiff, it may be said that its failure to make available to plaintiff the original transcriptions or, at the very least, the digests and summaries of such transactions, was not prejudicial to plaintiff.

But the Loyalty Review Board made use of these same materials and relied wholly on the purported content of these conversations in condemning plaintiff.[5] Its hearing was held on November 8, 1951. Long before this, it had been completely and officially revealed, not only to plaintiff but to the public at large, that the F.B.I. had made recordings of Jaffe's and plaintiff's conversations by planting a microphone in Jaffe's hotel room. The matter was first revealed to plaintiff at an executive session of the Tydings

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[5] The following excerpts from the Loyalty Review Board's opinion (Complaint, Exhibit A) reflect the extent to which that Board relied upon the F.B.I. reports concerning these conversations in reaching its judgment adverse to the plaintiff:

> "* * * there is information in the file indicating that on May 8 and 29 at Jaffe's room in the Statler, Service continued to talk freely with Jaffe, as he had on the 19th and 20th of April * * *" (Page 90.)
>
> "* * * We do * * * have some information concerning Service's conversations with Jaffe in Jaffe's room at the Statler in Washington on April 19th and 20 and May 8th and 29th. These indicate that there was some conviviality, and that Service talked very freely, discussing, among other things, troop dispositions and military plans * * * This intimacy of talk appears to have continued unabated * * *" (Page 92.)
>
> "* * * Yet, notwithstanding what Service knew about Jaffe as a Communist sympathizer, and not withstanding this stated dislike of him as a person, we find in the conversations between Jaffe and Service at the former's hotel room in the Statler, as reported by the F.B.I., no indication of any caution by Service in the continuous line of answers he made to Jaffe's 'nosey' inquiries on State Department matters. If Jaffe was nosey, he rarely failed to get from Service what he asked for, punctuated at one time, at least, by the statement, 'This is very secret.' Service undertook to get documents for Jaffe in the Department * * * his last long conversation with Jaffe on May 29 shows Service telling Jaffe matters which we think a reasonably decent person in Service's position of trust should have hesitated to disclose even to a friend in whose character he had complete faith * * *" ( Pages 94-95.)

Subcommittee on June 26, 1950, when an Assistant Attorney General of the United States stated that a "disk record" had been made of these conversations (Tydings Hearings, Part 1, p. 1395) and an obviously garbled and incomplete account of a conversation of May 8, 1945, was exhibited to plaintiff (id., p. 1404). The complete two volume text of the Tydings Committee Hearings was published and made available to the public in July, 1950, and included, *inter alia,* a letter from the Deputy Attorney General of the United States to Senator Tydings stating that the May 8, 1945, conversation between Jaffe and plaintiff "* * * was overheard through facilities of a technical installation in Jaffe's hotel room May 8, 1945." (Tydings Hearings, Part 2, p. 1915-1916).

In these circumstances, when all the facts as to the recordings of the conversations had been known to plaintiff and to the public at large for a period of a year and a half prior to his hearing before the Loyalty Review Board, the conclusion is inescapable that the withholding at the Loyalty Review Board hearing of the actual recordings and the digests and summaries of them was without any rational basis at all.

If, as we have shown, the withholding of the exact transcripts and the withholding of even the digests, summaries, and purported transcripts of conversations was unjustified, there can be no doubt that plaintiff was greatly prejudiced thereby. For it was plain that these purported transcripts and digests were highly inaccurate and garbled, and that they should have been subjected to the fullest opportunity for explanation, correction, and testing. This is evident because the purported transcript of one of these conversations —that of May 8, 1945—was exhibited to the plaintiff by the Tydings Subcommittee in the course of its hearings. Even this was not a complete transcript of a conversation. It purported merely to be a transcript of fragments of a conversation and, in considerable part, purported to represent no more than some anonymous summarizer's impressions of

what was said between Service and Jaffe. But even to the extent that this material purported to represent an exact transcription of what was said, it is obvious on the face of the document exhibited to plaintiff that the recording of the conversation was not accurately transcribed.[6] Although this is the only portion of any of the F.B.I. summaries which was ever directly revealed to plaintiff, references in the opinion of the Loyalty Review Board to other digests and summaries equally reveal how plaintiff was prejudiced by the failure to give him an opportunity to test, explain, and refute the unidentified material upon which the Loyalty

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[6] This purported transcript is printed at page 1404, Part 1, of the Tydings Hearings.

In the third remark attributed to plaintiff, the following appears: "(anyhow)," which indicates an effort on the part of the stenographer or clerk to edit or otherwise make intelligible the sentence.

The fourth remark attributed to Jaffe is indicated on the face of the transcript as "unintelligible."

In the last remark attributed to plaintiff in the course of the conversation, plaintiff is reported to refer to a new Soviet Ambassador named Petroff. There was in fact no Soviet Ambassador named Petroff either to Chungking or Washington or, so far as plaintiff was or is aware, to any other capital, and plaintiff did not refer to any Soviet official named Petroff in the course of this conversation.

In the same sentence, plaintiff is reflected as saying that "Award reports that * * *" Plaintiff knows of no person named Award or of any person, organization or other entity having the name, nickname or designation of Award, and this statement is totally meaningless and unintelligible and plaintiff did not make this statement.

The last remark attributed to Jaffe is the question, "Hurley's fighting Chunking then." In this context, by "Chungking," the question must correctly be interpreted to intend to ask whether it was correct that General Patrick J. Hurley was fighting with the officials of the recognized Central Government of China and its head, Generalissimo Chiang Kai-shek. The reply attributed by the transcript to plaintiff is, "Oh yes." The essence of such disagreement as plaintiff had with any policies of General Patrick J. Hurley, as Jaffe well knew, was that Hurley favored more total, unquestioning and unconditional support of Generalissimo Chiang Kai-shek than plaintiff then favored, and Jaffe did not in words or substance ask if Hurley were fighting Chungking or Generalissimo Chiang Kai-shek, and plaintiff did not in words or substance agree or assent to the proposition that Hurley was fighting Chungking or Generalissimo Chiang Kai-shek, and the sense of whatever Jaffe and plaintiff said on this topic, as reflected in the transcript of the purported record of the conversation between them, is entirely incorrect.

Review Board relied. For example, in its opinion (Complaint, Exhibit A), the Loyalty Review Board refers to the F.B.I. information before it concerning plaintiff's conversations with Jaffe on April 19 and 20, and May 8 and 29, and asserts that these reports indicated "that * * * there was some conviviality, and that Service talked very freely, discussing, among other things, troop dispositions and military plans which he said he had seen and which he said were 'very secret.'" This reference in the decision itself is the first intimation that plaintiff ever had concerning the mysterious element of "conviviality." At another point in its opinion, the Loyalty Review Board refers to the fact, according to F.B.I. reports, that "Service undertook to get documents for Jaffe in the Department." Actually, as plaintiff testified before the Loyalty Security Board and the Loyalty Review Board (Tydings Hearings, Part 2, pp. 2462-2464; Loyalty Review Board Transcript, pp. 61-63, Service affidavit, Annex 3), no such promise or undertaking was ever made by plaintiff at any time. In fact, plaintiff refused during the course of his conversation with Jaffe to obtain material which Jaffe requested, even though the material was not classified. The Loyalty Review Board obviously relied on this alleged fact as an important consideration in its conclusion as to the doubtfulness of plaintiff's loyalty.

Similarly, to this day, plaintiff has been given no intimation of the alleged content of "his last long conversation with Jaffe on May 29" which, according to the Loyalty Review Board "* * * shows Service telling Jaffe matters which * * * a reasonably decent person would have hesitated to disclose * * *" (Complaint, Exhibit A, p. 95.)

Plainly, the material before the Loyalty Review Board should have been disclosed to plaintiff and, in fact, the actual recordings of the conversations should have been made available so that they could be analyzed and properly evaluated.

Executive Order No. 9835, as amended by Executive Order 10241, established as a standard for an adverse finding as to the employee's loyalty that "on all the evidence,

there is a reasonable doubt as to the loyalty of the person involved to the Government of the United States." (Executive Order 10241, Part V. Sec. 1.)

This raises the question whether the term "evidence," as used in the Executive Order, includes summaries or digests of recorded conversations, where demonstrably incomplete, in a case where complete and accurate records of such conversations are available or could be made available.

The Court of Appeals of this Circuit held in *Bailey* v. *Richardson,* 182 F. (2d) 46, that the word "evidence" did include the testimony of anonymous confidential informants, even though the identity of such informants were not made available either to the Boards or to the accused employee. The Court of Appeals relied, in substantial part, upon those provisions of the Executive Order which specifically authorized, under certain circumstances, the withholding of the identity of a confidential informant.

That issue is not involved in the case at bar, and despite some of the language used by the majority of the Court of Appeals in the *Bailey* case, it is still open to this Court and to that Court to hold that Executive Order No. 9835 does require evidence, in the conventional sense of the term, and does require an opportunity for the accused employee to have access to the evidence against him and to test it by long-recognized adversary techniques *if no confidential informant is involved.* The Order itself says that the employee should be afforded "maximum protection." Granting, for sake of argument, that there is an inevitable conflict between the protection of the employee's rights and the security requirements of the Government in connection with confidential informants, no such conflict is presented in the case at bar. Neither the *Bailey* case nor any other decided case affords support for the proposition that the President authorized the destruction of livelihood and reputation without full exposure of evidence for testing its pro-

bative value in the absence of any public interest to be served by keeping such evidence secret and fragmentary.

As we have pointed out above, Part II, Section 2, a., of the Order affords to the accused officer or employee an administrative hearing. This term, like the word "evidence," has an accepted and traditional meaning. The Supreme Court has stated, "* * * manifestly there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain, or refute * * *" *I.C.C.* v. *Louisville & Nashville RR. Co.*, 227 U. S. 88, 93.

In the case at bar, the plaintiff was given no opportunity to test, explain, or refute that version of the conversations between him and Jaffe which was made available to the Loyalty Review Board and which was the only basis for his condemnation. (Defendants' Pre-Trial Statement, p. 5.) Again, granting, for the sake of argument, that Executive Order No. 9835 should be deemed to have chipped away from the normal conception of an administrative hearing, the right to test, explain, or refute the testimony of confidential informants, for security reasons, we are still far from a demonstrated purpose to shatter the entire conception of an administrative hearing by holding that, as used by the President under these circumstances, it meant nothing at all. All that the *Bailey* case held, on its facts, was that the Executive Order permitted the Loyalty Boards to consider the untested statements of confidential informants, (1) without knowing or revealing to the employee their identities and (2) without revealing to the accused employee the substance of their testimony. But such a view does not necessitate a holding in this case to the effect that both the words "evidence" and "administrative hearing" were, by the Executive Order, drained of all their traditional meaning.

As a matter of fact, however, it seems plain that the Executive Order was not in fact intended to—and could not constitutionally have—so watered down the ordinary

concept of an administrative hearing. It seems plain that the Supreme Court has now disapproved the second part of the *Bailey* holding referred to above, i.e., that even when confidential informants are involved, the substance of the information as well as the identity of the informant may be withheld from the accused employee. *United States* v. *Nugent,* 346 U. S. 1; *Simmons* v. *United States,* — U. S. —, No. 251 Oct. Term, 1954, decided March 14, 1955, 23 LW 4127. *Bailey* was decided in this Circuit on March 12, 1950, and affirmed by an evenly divided Supreme Court on April 30, 1951. More than two years later, the Supreme Court held in *United States* v. *Nugent, supra,* that the statutory requirement of a "hearing" under §6(j) of the Selective Service Act of 1948 [50 U.S.C., §456(j)], while not requiring that F.B.I. reports be produced for inspection, required that "* * * a fair résumé of any adverse evidence in the investigator's report * * *" (346 U. S. at p. 6) be furnished to one claiming exemption from military service as a conscientious objector. By so construing the statute, the Court found it immune from constitutional attack (id. at p. 10). And in *Simmons* v. *United States, supra,* the Supreme Court in March of this year, asserting that "A fair résumé is one which will permit the registrant to defend against the adverse evidence—to explain it, rebut it, or otherwise detract from its damaging force * * *" (23 LW at p. 4130), held that when no such fair résumé is afforded,

> "* * * petitioner has thereby been deprived of an opportunity to answer the charges against him. This is not an incidental infringement of technical rights. Petitioner has been deprived of the fair hearing required by the Act, a fundamental safeguard, and he need not specify the precise manner in which he would have used this right—and how such use would have aided his cause—in order to complain of the deprivation." (id.)

And while both cases involved the construction of a statute, it is evident that this construction was thought necessary

to prevent the statute from falling short of "* * * our underlying concepts of procedural regularity and of basic fair play * * *"[7] and, hence, short of the constitutional requirements of due process.

That the action of Government officials in carrying out the Government's employee loyalty program and Executive Order No. 9835, in particular is subject to the restrictions of the due process clause, seems clear from *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123. Mr. Justice Burton stated (341 U. S. 123, 136):

> "The Executive Order contains no express or implied attempt to confer power on anyone to act arbitrarily or capriciously—even assuming a constitutional power to do so. The order includes in the purposes of the President's program not only the protection of the United States against disloyal employees but the 'equal protection' of loyal employees against unfounded accusations of disloyalty. 3 CFR, 1947 Supp., p. 129, 12 Fed. Reg. 1935. The standards stated for refusal of and removal from employment require that 'on all the evidence, reasonable grounds [shall] exist for belief that the person involved is disloyal * * *' Id., at 132, 12 Fed. Reg. 1938. Obviously, it would be contrary to the purpose of that order to place on a list to be disseminated under the Loyalty Program any designation of an organization that was patently arbitrary and contrary to the uncontroverted material facts. The order contains the express requirement that each designation of an organization by the Attorney General on such a list shall be made only after an 'appropriate * * * determination' as prescribed in Part III, § 3. An 'appropriate' governmental 'determination' must be the result of a process of reasoning. It cannot be an arbitrary fiat contrary to the known facts. This is inherent in the meaning of 'determination.' It is implicit in a government of laws and not of men. Where an act of an official plainly falls outside of the scope of his authority, he does not make that act legal by doing

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[7] Clark, J., in *Gonzales* v. *United States,* —U.S. —, No. 69 Oct. Term, 1954, decided March 14, 1955, 23 LW 4130 at p. 4132.

> it and then invoking the doctrine of administrative construction to cover it."

The above quotation is significant in view of the fact that Mr. Justice Burton, though not speaking for the entire Court or even for a majority of the Court, confined his reasoning most closely of all the Justices making up the Court's majority to the bare facts of the specific cases and pleadings. It will be further noted that in the entire *Anti-Fascist Refugee* cases, no administrative hearing had been afforded to the affected organizations; and the sum total of all the opinions of the Justices making up the Court's majority would indicate a consensus that the due process clause required both the revelation of evidence and an administrative hearing, at least where no persuasive security reason justified the suppression of truth.

But if there were any doubt as to the due process rights of Government employees, it was settled in *Wieman* v. *Updegraff*, 344 U.S. 183, where, after referring to language in the opinion of the Court in *United Public Workers* v. *Mitchell*, 330 U.S. 75, to the effect that persons seeking employment in the New York public schools have "no right to work for the State," Mr. Justice Clark, speaking for a clear majority of the Court, stated (344 U.S. at 191-192):

> "* * * To draw from this language the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue * * *
>
> "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory."

As has been shown, plaintiff was not merely denied the opportunity to be confronted with the actual recordings of his conversations; he was not even given access to the di-

gests or any kind of a purported summary [8] of his conversations with Jaffe. This failure to supply any kind of a fair résumé of the "evidence" which was the sole basis (Defendants' Pre-Trial Statement, p. 5) for his condemnation was plainly fatal under the standards affirmed in *Nugent* [9] and *Simmons*.

Mr. Justice Clark, who joined in *Nugent* and wrote the opinion of the Court in *Simmons* and in *Wieman* v. *Updegraff, supra,* was Attorney General of the United States when Executive Order No. 9835 was promulgated and, presumptively, was its draftsman and the principal adviser to the President on the entire subject. His views, as expressed in the cases referred to, therefore, are particularly illuminating as to the intent of the Executive when he recited in the Executive Order the necessity for assuring "maximum" protection "* * * from unfounded accusations of disloyalty * * *" and required that (Part II, 2, b):

> "b. The officer or employee shall be served with a written notice of such hearing in sufficient time, and shall be informed therein of the nature of the charges against him in sufficient detail, so that he will be enabled to prepare his defense. The charges shall be stated as specifically and completely as, in the discretion of the employing department or agency, security considerations permit, and the officer or employee shall be informed in the notice (1) of his right to reply to such charges in writing within a specified reasonable period of time, (2) of his right to an administrative hearing on such charges before a loyalty board, and (3) of his right to appear before such board personally, to be ac-

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[8] Except the obviously garbled and inaccurate résumé of one conversation shown him by the Tydings Subcommittee, but never by either of the Loyalty Boards.

[9] It is of particular interest that while Chief Justice Vinson joined in the dissent in *Joint Anti-Fascist,* supra, and agreed with the view that "* * * The Constitution requires for the employee no more than this fair opportunity to explain his questioned activities * * *" (341 U.S. 123 at p. 209), he made clear in *Nugent* that this "fair opportunity to explain his questioned activities" requires that he be furnished a "* * * fair résumé of any adverse evidence in the investigator's report" (346 U.S. 1, at p. 10).

companied by counsel or representative of his own choosing, and to present evidence on his behalf, through witness or by affidavit.''

Thus, all relevant considerations support the view that the Executive Order should be construed to prohibit the withholding, in circumstances such as are here involved, of such vital information, so heavily relied on in reaching adverse judgment. Only by this construction can substance be given to the language of the Executive Order assuring a hearing on the evidence and according maximum protection to affected employees and only thus can the constitutional validity of the Order under the Fifth Amendment be preserved.

**3. The Loyalty Review Board's conclusion that there was a reasonable doubt of plaintiff's loyalty is arbitrary and unreasonable because unsupported by any evidence.**

Apart from the considerations already advanced, the Loyalty Review Board's decision is fatally deficient in another respect. The Board has concluded that there is a reasonable doubt of plaintiff's loyalty because of his "intentional, unauthorized disclosure * * *, under circumstances which * * * indicate disloyalty to the United States, of * * * information of a confidential or non-public character * * *" within the meaning of Part V, 1, d of Executive Order 9835, as amended.

The three factors specified in the standards are vital. (a) There must be "an unauthorized disclosure"; (b) it must be of confidential or non-public information; and—of paramount importance—(c) the disclosure must be under circumstances indicating disloyalty to the United States.

On the Board's own findings, as reflected in its opinion, these three necessary factual premises are wholly absent in this case.

As the Government has conceded, the Loyalty Review

Board based its conclusions wholly upon plaintiff's conversations with Jaffe at the Statler Hotel. (Defendants' Pre-Trial Statement, p. 5.)

(a) Were plaintiff's disclosures unauthorized? The answer, copiously substantiated during the Loyalty Security Board hearings and not refuted by any evidence to the contrary, is that plaintiff's actions were consistent with current and acknowledged practice both in the State Department and in the Army position in which plaintiff had been serving and from which all the information involved had originated; that they were similar in substance to other specifically authorized dealings with the press by plaintiff during the same period; and that his treatment of the press and furnishing of background information was known by and approved by his superiors and responsible persons in the Army with which he had been serving and in the Department of State. The Loyalty Review Board itself acknowledges: " * * *there is no evidence that the employee stole or abstracted from the files and transmitted to Jaffe or any other persons any official files * * * the practice of giving out information appears to have been somewhat loose * * *"

The authoritative answer to this question, verified by the approval of the Secretary of State, is provided by the opinion of the Loyalty Security Board:

> "* * * In this connection the nature of Mr. Service's function in China, from which he was freshly arrived, becomes of moment. One of Mr. Service's official duties under General Stilwell had been to serve as public relations officer for Army Headquarters, and as such to work closely with American correspondents and to furnish them 'background information' regarding the political situation in China. Understanding of this situation was essential to intelligent and accurate press reporting. 'Background information' was understood at Army Headquarters to include, at the discretion of the officer, classified information, which could not itself be published, but which would enable correspondents correctly to interpret and report events as they

> occurred. On his return to the United States in October 1944, as the first American official to return after a visit to the Communist-held areas in China, Mr. Service was sought after, not only by government agencies whose work related to China, but also by newspaper people and other writers on Far Eastern affairs. He was invited, and with the authorization of his superiors accepted the invitation, to address an 'off-the-record' meeting of the Institute of Pacific Relations. For all of these conferences he used as working material the substance of his observations in China, the very matter which was contained in his classified reports. It is apparent to the Board that Mr. Service, without inquiring into Mr. Jaffe's background or credentials, but solely on the basis of Mr. Jaffe's connection with "Amerasia," assumed to treat Mr. Jaffe as a reputable writer, and to give him the same sort of 'background information' that he had been accustomed to give newspaper men in China."

(b) Were plaintiff's disclosures of a confidential or nonpublic character? The answer again is plainly in the negative. The evidence is clear and overwhelming that such information as was made available by plaintiff to Jaffe was carefully selected by plaintiff from a vastly greater fund of information known to plaintiff and in his authorized possession, and was of a nature permissible by actual and accepted practice, both in the plaintiff's position with the Army and in the State Department at the time, for use as background information by responsible journalists. None of the information give Jaffe by plaintiff was not generally known in substance to American correspondents in China at the time. In fact, the record clearly shows that plaintiff in his dealings with Jaffe did not approach the frankness with which correspondents in the field were treated by responsible officers, both of the State Department and Army.

With due respect, the members of the Loyalty Review Board, lacking any background of specialized knowledge in the particular period and circumstances and with neither

relevant governmental or journalistic experience to enable them to define "background information" or to determine permissible relations as of that time with the press, were hardly in a position—more than six years after the event—to determine precisely what information, as of April and May 1945, was in fact confidential and unsuitable for journalistic background use. The Loyalty Review Board had no new evidence on this point to overcome the testimony of practising newspapermen, Army officers, and officials of the Department of State.

The correct and, we submit, authoritative answer to this question is the finding of the Loyalty Security Board, to which the Secretary of State subscribed:

> "* * * the documents in question contained nothing that could be considered harmful to the national security; they were reports of Mr. Service's personal observations on the aims and situation of the Chinese Communists * * * It has been charged that Mr. Service in these conversations disclosed classified information to Mr. Jaffe. It appeared on hearing that Mr. Service on his return to the United States in April, 1945, was not in possession, nor advised of the contents of, any classified documents regarding military plans or the whereabouts of General Stilwell. As a matter of fact he was not advised of any secret information at all concerning the military plans of the United States or of General Stilwell. He was aware only of general discussions and speculations regarding the possibility of a landing in China, and of the desirability of cooperating with whatever Chinese forces might be met there. General Stilwell had told him that he was looking for a 'fighting job' in the Pacific. He did not know the determination of any of these issues. He could therefore not have been guilty of disclosing secret information as alleged, for he had none. It is to be noted that oral information of the sort mentioned does not, like a document, bear on its face its classification, and that it is a mark of prudence, rather than the opposite, for a government official in the discussion of military speculations with the press in war time, to refer to the subject matter as secret or confidential, in order that

no conclusions may be attributed by the press to government sources. The Board does not find any indiscretions on the part of Mr. Service in this issue."

(c) Were plaintiff's disclosures made under circumstances which indicate disloyalty? This question is of importance for it is the sole differentiation of the loyalty standard from the parallel security standard. It is thus the only peg on which the Loyalty Review Board can hang its purported claim of jurisdiction.

The phrase "circumstances which may indicate disloyalty" is meaningless, we submit, unless related to and considered in connection with the standards and criteria by which disloyalty is defined and to be determined. The Loyalty Review Board made no finding of fact concerning plaintiff which even purports to establish such relation. Indeed, it could not, for no such basis exists.

The Board specifically finds that plaintiff was never a member of the Communist Party or of any organization on the Attorney General's list. It does not suggest that any of plaintiff's action, views, or intent raise any doubt of his loyalty under any of the other criteria which define disloyalty—and, hence, must be the guide to the circumstances which may indicate disloyalty.

Going beyond the language of the Executive Order, disloyalty by any reasonable standard, must involve either actions or willingness or intent to commit actions, harmful and contrary to the interests of the United States. The Loyalty Review Board makes no finding that the interests of the United States were in fact harmed or adversely affected by plaintiff's actions. Nor do we know of either allegation or evidence that the interests of the United States were so affected.

We recognize that there is no need, under existing regulations, for a positive finding of disloyalty. However, a reasonable doubt of loyalty must surely be based on adequate reason to doubt that the employee was without intent to

commit acts harmful and contrary to the interests of the United States. All the evidence here refutes any such motivation or intent. Nor does the Board, or any evidence before the Board known to plaintiff, suggest any such motivation or intent.

To the contrary, all the evidence and the logic of the circumstances, clearly indicate that plaintiff's motives and intent during the brief episode with Jaffe, as well as before and since that time, were wholly loyal and devoted to the interests of the United States. The Board, we submit, explains no reasonable basis for a doubt of this ultimate and controlling fact.

Indeed, the Loyalty Review Board in its opinion does little more than to find evidence of poor judgment and indiscretion—which plaintiff has always freely admitted, but there is nothing in the Executive Orders under which the Loyalty Review Board functioned to justify the transmutation of indiscretion into disloyalty.

To the extent that the Loyalty Review Board dealt with this issue at all, it relied wholly upon its own conclusion that plaintiff was "suspicious" of Jaffe and "knew almost from the start of his relations with Jaffe of Jaffe's true character." There is no evidence to support—and indeed all the evidence controverts the Board's inference that plaintiff suspected Jaffe of being a Communist. Indeed, plaintiff does not now know what is Jaffe's true character, and it may be doubted whether the Loyalty Review Board knew. Such inquiries as plaintiff made on this point simply indicate reasonable prudence on the plaintiff's part.

Plaintiff asked Roth (a Lieutenant in the Office of Naval Intelligence specializing in Far Eastern matters) if Jaffe was a Communist, and Roth replied that he did not think so. Beyond this, there is only the evidence in a dimly remembered conversation with one Isaacs, more than six years before, that plaintiff obtained an impression that Isaacs disliked Jaffe. This feeble evidence is not enough even to turn the color of legal litmus paper.

That plaintiff exercised poor judgment and a lack of discretion in this episode, he has always admitted. It was an indiscretion known to his employer, the Department of State, the only agency, then or now, competent to deal with the matter. Plaintiff was, in fact, called for a hearing before the then acting Board of Foreign Service Personnel and was reprimanded and punished but reinstated. The Loyalty Security Board states:

> "* * * the record contains no evidence that Mr. Service has ever, subsequent to the Jaffe incident, been guilty of any indiscretion. The Board believes that the experience Mr. Service has been through as a result of his indiscretion in 1945 has served to make him far more than normally security conscious."

The whole thrust of the Loyalty Review Board's effort to justify its finding is to establish its grounds for doubting his good judgment in this single episode of 6½ years ago. But this will not support the entirely different and inestimably more serious conclusion that there is a reasonable doubt of his loyalty to the United States.

The conclusion is clear and inescapable, we submit, that in plaintiff's case the Loyalty Review Board went beyond its prescribed field of authority, failed to draw the vital distinction between indiscretion and disloyalty, and did in fact render a judgment based, however weakly, on considerations of security risk alone which were clearly beyond its jurisdiction.

**4. Plaintiff was denied an opportunity to appeal to the Secretary of State from the recommendation of the Loyalty Review Board.**

On December 13, 1951, the Loyalty Review Board advised plaintiff and the Secretary of State of its finding in plaintiff's case and requested that it be advised of the effective date of plaintiff's removal. It also furnished to the Secre-

tary of State—but not to plaintiff—a copy of its opinion disclosing the basis for its finding.

On the same date, plaintiff and his counsel conferred with the Deputy Undersecretary, requesting that any immediate action by the Secretary of State be withheld until plaintiff could appeal to the Secretary. This opportunity was sought, not as a matter of grace but as of right. It is expressly guaranteed to every employee by Part II, § 3 of the Executive Order [10] and by the Regulations and Procedures of the Department of State, § 395.1,[11] § 396.11, and § 396.12:[12]

> "If the decision is for separation from employment for disloyalty and as a security risk, or only as a security risk, the officer or employee shall be so notified by the Assistant Secretary—Administration and advised in writing of his right to appeal to the Secretary of State, or his designee or designees, within 10 calendar days after receipt of such notifications. In those cases where separation from employment is contemplated only on the grounds of a security risk, the notice will state that the officer or employee is not considered disloyal by the Department." (396.11.)
>
> "Upon the exercise by the officer or employee of such right of appeal, the Secretary, or his designee or de-

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[10] "A recommendation of removal by a loyalty board shall be subject to appeal by the officer or employee affected, prior to his removal, to the head of the employing department * * * or to such person * * * as may be designated by such head * * *"

[11] "395.1 *Statement of Charges and Right to Hearing and Appeal* "As indicated in sec. 394, before any officer or employee of the Department of State or of the Foreign Service of the United States is removed from employment for disloyalty or as a security risk, he shall be provided with a statement of the charges against him, and be granted the right to a hearing before the LSB and an appeal to the Secretary of State, or his designee or designees. If he is charged with disloyalty, he may appeal to the Loyalty Review Board for a determination as to his loyalty. An officer or employee may, however, be suspended at any time in the interests of national security pending a determination with respect to loyalty or security risk."

[12] The quoted provisions are those in the Regulations and Procedures promulgated on March 11, 1949, which were those referred to in the letter of charges (Complaint, Exh. C). Substantially the same provisions appear in §§ 396.11 and 396.12 of the Regulations and Procedures, as revised on May 4, 1951.

> signees, will afford the officer or employee a hearing on the record at a date not earlier than one week after receipt by the Secretary of written notice of appeal. This hearing shall be private and shall be attended only by the Secretary, and/or his designee or designees, the officer or employee, and a single counsel or representative of his own choosing. The officer or employee shall be permitted to appear personally, and either by himself or his counsel or representative, to present a statement or brief in his own behalf. No witnesses will be heard by the Secretary, or his designee or designees, nor will any new evidence be considered which is not contained in the record or submitted at that hearing as the statement or brief of the officer or employee concerned. A stenotypist record will be made of the proceedings and a copy of the transcript will be provided to the officer or employee upon request." (396.12.)

Indeed, apart from these express provisions, the "hearing" assured to every employee by the Executive Order plainly requires that the employee be given an opportunity to rebut the advisory recommendation of the Loyalty Review Board and to be furnished with a copy of that Board's opinion so that he could know the thrust of the Board's recommendation and muster his facts and arguments to meet its contentions. *Gonzales* v. *United States,* — U.S. —, No. 69, Oct. Term, 1954, 23 LW 4130, 4132.

But despite these plain requirements of the Executive Order and the Secretary's Regulations, plaintiff was allowed no opportunity to appeal to the Secretary. Instead, the Deputy Undersecretary responded to his request for this opportunity by stating that the Loyalty Board's action was final, that the decision to discharge plaintiff had already been made, and that the press had already been notified that a public announcement would shortly be made. Thereupon, the Deputy Undersecretary handed to plaintiff an 18-page mimeographed press release (Exhibit H) announcing plaintiff's discharge.

This denial of plaintiff's right to a meaningful appeal to the Secretary of State was a plain violation of the require-

ments of the Executive Order, as well as of the Secretary's own Regulations.

**5. The Secretary of State made no independent determination on all the evidence that there was a reasonable doubt of plaintiff's loyalty.**

On the numerous occasions when the Secretary of State or his Deputy Undersecretary considered all the evidence in plaintiff's case, they concluded that there was no reasonable doubt of plaintiff's loyalty. On December 13, 1951, however, upon receipt of the Loyalty Review Board's recommendation "reversing" the State Department Loyalty Security Board's findings, the Secretary immediately discharged plaintiff, as the Deputy Undersecretary stated in his letter of December 27, 1951, "* * * solely as a result of the aforementioned finding of the Loyalty Review Board * * * "

In so doing, he was acting conformably to Section 396.4 of his own Regulations and Procedures of March 11, 1949, which provides:[13]

> "If, after consideration of a case, the Loyalty Review Board makes an advisory recommendation to the Secretary of State that the officer or employee should be removed from employment under the Loyalty standard referred to in sec. 392, *the Department will take prompt administrative action to remove him from employment.*" (Emphasis supplied.)

By this regulation, the Secretary had announced in advance that he would automatically discharge any employee as to whom the Loyalty Review Board recommended unfavorably. That he followed his regulation in plaintiff's case is demonstrated by the sequence of events referred to above.

"The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 87; *N.L.R.B.* v. *Capital*

[13] Substantially the same provision appears as § 396.4 and § 396.41 of the Regulations and Procedures as revised on May 5, 1951.

*Transit Co.*, — App. D.C. —, — F. (2d) —, No. 12259, decided February 17, 1955. And that action "* * * cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its actions can be sustained." *Chenery, supra,* 318 U.S. at p. 94-95. So judged, this regulation and the Secretary's action pursuant to it plainly denied plaintiff the safeguards provided by the Executive Order. The Executive Order did not authorize plaintiff's dismissal upon the *ipse dixit* of the Loyalty Review Board. The matter was settled in this Circuit by *Kutcher* v. *Gray,* 199 F. (2d) 783, where the Court of Appeals said (at p. 787):

> "In the light of these explicit provisions of the Executive Order we think there can be no doubt that the decision of the Branch Board was in legal effect exactly what the Executive Order declares it should be, a 'recommendation' to the Administrator for Kutcher's removal. It was just that,—nothing more. The final decision rested with the Administrator. Upon him fell the duty to impartially determine on all the evidence whether there were reasonable grounds for belief that Kutcher was disloyal to the Government of the United States. That was the ultimate, the controlling issue. Kutcher was entitled to the Administrator's decision of that very question."

Plaintiff was entitled to the Secretary's impartial determination "on all the evidence whether there were reasonable grounds for belief that" plaintiff was disloyal. But, by Section 396.4 of the Regulations and Procedures of the Department of State, the Secretary had predetermined, without regard to his own evaluation of the evidence in the particular case, to accept automatically every adverse recommendation of the Loyalty Review Board. By so doing, he failed to perform his own duty and his discharge of plaintiff was illegal under the Executive Order.

Plaintiff was discharged on December 13, 1951. *Kutcher* v. *Gray* was decided by the Court of Appeals on October

16, 1952. Instructed by *Kutcher*, the Secretary thereafter adopted a wholly different approach from that prescribed by his Regulation 396.4. In the case of another Foreign Service Officer, John Carter Vincent, the Loyalty Review Board had also passed unfavorable judgment. On January 3, 1953, Secretary Acheson addressed a memorandum to the President in which he said in part,

> "I have recently been advised by Chairman Bingham of the Loyalty Review Board that * * * it has concluded that there is a reasonable doubt as to [Vincent's] loyalty * * *
>
> "Such a recommendation by so distinguished a Board is indeed serious and impressive and must be given great weight. The final responsibility, however, for making a decision as to whether Mr. Vincent should be dismissed is that of the Secretary of State. I am advised that any doubt which might have previously existed on this point has been removed by the recent decision of the United States Circuit Court of Appeals for the District of Columbia in *James Kutcher, Appellant*, v. *Carl Gray, Jr., Veterans Administration, Appellee*. That case establishes that the action of the Board is a recommendation 'just that,—nothing more' and that in the last analysis upon the Head of the Department is imposed 'the duty to impartially determine on all the evidence' the proper disposition of the case."

This, of course, is a far cry from § 396.4 of the Regulations and Procedures and the Secretary's public statement in plaintiff's case acknowledging that his earlier action had been "reversed" by the Loyalty Review Board.

**6. Executive Order 9835 deprived plaintiff of his constitutional rights.**

We have shown above that by withholding from plaintiff the actual recordings of his conversations with Jaffe—which constituted the sole basis for the Loyalty Review Board's adverse finding—or at least a fair résumé of them,

the Government denied him the fair hearing assured him by the Executive Order. We have contended that this result should be achieved as a matter of construction of the Executive Order under the familiar rule that the Courts will so far as possible avoid statutory interpretations giving rise to constitutional problems. *Crowell* v. *Benson,* 285 U.S. 22, 62; *United States* v. *CIO,* 335 U.S. 106; *United States* v. *Harriss,* 347 U.S. 612. If this construction is not placed on the Executive Order provisions for a hearing, then, as we have suggested, the Order itself must be regarded as depriving plaintiff of due process of law, in violation of the Fifth Amendment.

Apart from these considerations, plaintiff contends that the Executive Order, as amended, denied him his rights under the Sixth Amendment to a full judicial trial before an impartial jury under circumstances in which he is confronted by his accusers and by the evidence against him and to subject all witnesses to cross examination. Plaintiff advances no further argument on this point but relies upon the considerations advanced in the dissenting opinion of Judge Edgerton in *Bailey* v. *Richardson, supra.*

Plaintiff also contends that to the extent that his dismissal was authorized by Executive Order 9835, he was being punished for actions taken in 1945 when they were lawful, and that the Executive Order was *ex post facto* legislation. In support of this contention, plaintiff relies on the considerations advanced by Justices Black and Douglas in *Joint Anti-Fascist Refugee Committee* v. *McGrath, supra.*

The foregoing considerations suffice to establish that plaintiff's dismissal, in violation of The Foreign Service Act of 1946, cannot be justified under Executive Order 9835, as amended. We turn now to a consideration of the other source of authority relied upon by the Secretary of State to sustain plaintiff's dismissal: §103 of Public Law 188, 82nd Congress, commonly called "the McCarran Rider."

**C. Plaintiff's Dismissal Was Not Validated By The McCarran Rider.**

The so-called "McCarran Rider," Public Law 188, 82nd Cong., § 103, affords the sole possible statutory basis for dismissal of any employee or officer of the Foreign Service by procedures other than those prescribed in the Foreign Service Act. Section 103 was as follows:

> "Notwithstanding the provisions of Section 6 of the Act of August 24, 1912 (37 Stat. 555), or the provisions of any other law, the Secretary of State may, in his absolute discretion, during the current fiscal year, terminate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interests of the United States."

The Government, of course, contends that because of this absolute discretion plaintiff's discharge was beyond the reach of judicial review. But this contention overshoots the mark. The power conferred by the statute is concededly broad and would, doubtless, be sufficient to have accomplished plaintiff's dismissal if the Secretary's discretion had, in fact, been validly exercised. But it was not. And it is well established that even absolute administrative discretion may not be arbitrarily exercised and that an exercise of such a discretion under a misapprehension of the law is an arbitrary and unreasonable exercise which is subject to judicial review and correction. *Perkins* v. *Elg*, 307 U.S. 325; *Arenas* v. *United States*, 322 U.S. 419; *Wendell* v. *Spencer*, — App. D.C. —, 217 F. (2d) 858.

In this case, the McCarran Rider is ineffective to sustain plaintiff's discharge in violation of the Foreign Service Act of 1946, for two reasons.

*First.* Secretary Acheson failed in this case to exercise the discretion required of him by the Act. As we have shown above, the Secretary of State by §396.4 of his Regu-

lations and Procedures had announced, as early as March 11, 1949, that he would, without any consideration of any particular case, promptly discharge any employee against whom the Loyalty Review Board should recommend unfavorably. In these circumstances, it seems plain that he had by his regulation effectively precluded himself from exercising his discretion in each particular case and in plaintiff's particular case. It is of no moment whether he so precluded himself from exercising his discretion because he deemed himself required to do so as a matter law or whether he merely concluded to do so as a matter of policy. In either case, his action is subject to judicial review and correction, *Perkins* v. *Elg,* 307 U.S. 325 (refusal to exercise discretion because of mistaken understanding of plaintiff's legal status); *Mastrapasqua* v. *Shaughnessy,* 180 F. (2d) 999 (CA 2), (refusal to exercise discretion because of a policy determination); *Cook Chocolate Co.* v. *Miller,* 72 F. Supp. 573 (D.C. D.C.). The effect of his regulation was precisely the same as the effect of the Attorney General's secret directive in *United States ex rel. Accardi* v. *Shaughnessy,* 347 U.S. 260. That case was a habeas corpus action, brought by a deportable alien, who had sought and was denied suspension of his deportation. The suspension was denied by the Board of Immigration Appeals. The statute in question granted discretion to the Attorney General to suspend the deportation of certain classes of deportable aliens. The Attorney General had established a Board of Immigration Appeals and delegated to it his own statutory power in connection with suspension applications. Decisions of the Board were to be final, except in certain specified categories of cases where the Board's opinion was to be subject to the Attorney General's personal review.

The Board denied the alien's application for suspension and the alien challenged the denial upon the ground that the Board had not exercised its own discretion but had acted pursuant to a secret directive of the Attorney Gen-

eral which circulated a list of individuals described as a "proscribed list of alien deportees."

The Supreme Court held that, under these circumstances, the petitioner had been denied his rights under the law and departmental regulations, stating (347 U.S., at p. 266-267):

> "And if the word 'discretion' means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience. This applies with equal force to the Board and the Attorney General. In short, as long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner."

Just as in *Accardi,* the Attorney General had denied himself the right to sidestep the Board of his own creation or dictate its decision, so in this case, the Congress has, by reposing personal discretion in the Secretary of State, denied his right to abdicate his responsibilities to the Loyalty Review Board—that is, to sidestep his duty to exercise his own discretion and to automatically adopt the decision of another. Yet that is precisely what he did do by §396.4 of his Regulations and Procedures.

This fundamental principle is made even plainer by the further statement of the Court in *Accardi* v. *Shaughnessy, supra:*

> "It is important to emphasize that we are not here reviewing and reversing the *manner* in which discretion was exercised * * * Rather, we object to the Board's alleged *failure to exercise* its own discretion, contrary to existing valid regulations." [Italics are the Court's.]

It may be argued that in the present case the Secretary has by his Regulation 396.4 not failed to exercise his discretion but has merely announced how he will exercise it in all cases of a particular class, i.e., where the Loyalty Review Board has recommended unfavorably. But this argument

would equally have sustained the Board of Immigration Appeals, i.e., it could be said to have exercised its discretion by determining to refuse to act on cases on the Attorney General's secret list. The Supreme Court rejected the argument for the obvious reason that it is but an exercise in semantics.

It is, therefore, evident that plaintiff's dismissal was accomplished in a manner not authorized by law. If he was struck down under the Loyalty Program, his dismissal runs afoul of the *Kutcher* case; if under the McCarran Rider, it runs afoul of the *Accardi* case. For the Courts have made it explicit that one charged, whether by the President's Loyalty Order or by statute, with the exercise of a personal discretion, must exercise that discretion according to his own judgment or conscience and not automatically upon dictation by an outside force.

*Second.* While the statute broadly authorized the Secretary of State to dismiss officers or employees without any procedural guarantees of notice of the charges, hearing, and appeal, the Secretary of State, by his own regulations, has imposed upon himself restrictions as to the manner in which he will exercise the power conferred upon him by statute. His Regulation 391.3 of March 11, 1949, provides:

> "391.3. In addition, the Secretary of State has been granted by Congress the right, in his absolute discretion, to terminate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interests of the United States. In the exercise of this right, the Department will, so far as possible, afford its employees the same protection as those provided under the Loyalty Program."

By this, the Secretary plainly subjected himself, in the exercise of his statutory power of separation, to the procedural limitations of Executive Order 9835 and accorded to plaintiff the safeguards of that Order and of his own imple-

menting regulations thereunder. And the Secretary may no more sidestep his own regulations than the Attorney General could in *Accardi* v. *Shaughnessy, supra.* "* * * [I]t was binding upon the Secretary until repealed or modified by him." *Sheridan-Wyoming Coal Co.* v. *Krug,* 172 F. (2d) 282, at p. 287 (C.A. D.C.).

The only exception to this self-imposed restriction is that the Loyalty program safeguards are to be applied "* * * so far as possible * * *" But, there is no suggestion that any rational consideration precluded the application of these safeguards here or that the Secretary of State or any deputy made any determination that it was not "possible" to apply these safeguards in plaintiff's case. Indeed, the letter of charges (Complaint, Exhibit C) expressly provides that a hearing will be held under § 395 of the Regulations and Procedures to determine whether plaintiff should be dismissed under the McCarran Rider.[14] Consequently, it is clear that the validity of plaintiff's dismissal as an exercise of the Secretary's McCarran Rider power must be determined by reference to whether it was in conformity with Executive Order 9835. We have already detailed the numerous respects in which plaintiff was denied the procedural guarantees of that Order. This fatal infirmity, therefore, equally infects the Secretary's action under the McCarran Rider.

Accordingly, because he was denied his substantive right to an independent exercise of the Secretary's personal discretion and because he was denied the procedural guarantees of the Loyalty Executive Order (or of the Constitution), plaintiff's discharge was not valid under the McCarran Rider and it must, therefore, be found illegal under §§ 637 and 638 of The Foreign Service Act of 1946. Plain-

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[14] While the statutory citation is different, this is only because the McCarran Rider was enacted annually as a rider to the Departmental Appropriation Act. The reference in the charge is to the 1950 Act while the 1951 Act was adduced when plaintiff was discharged in December 1951.

tiff should, accordingly, be ordered reinstated to his former position.

**II. Plaintiff Was Unjustifiably Defamed By Defendants' Actions And The Government's Records Should Be Corrected To Eliminate The Continuing Injury Resulting Therefrom.**

On December 13, 1951, defendant Bingham, Chairman of the Loyalty Review Board, published to Secretary Acheson the purported finding of the Loyalty Review Board that there was a reasonable doubt of plaintiff's loyalty to the Government of the United States. On the same day, the Secretary of State, by his press release (Complaint, Exhibit H), published to the world the Loyalty Review Board's opinion and announced plaintiff's dismissal from the public service on the ground that there was a reasonable doubt of plaintiff's loyalty. As the Supreme Court has held, *Wieman* v. *Updegraff*, 344 U.S. 183, at p. 190-191:

> "There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy."

Wholly independent of the relief sought by plaintiff against his unlawful separation from the Foreign Service, he seeks relief against the injury done him and which continues to be done him by this unjustified defamation of his character.

Whatever may be the powers conferred by the Executive Order or the McCarran Rider, or by the two in conjunction, neither even purports to authorize the head of a department to accompany the dismissal of an employee with the badge of infamy resulting from a disloyalty characterization.

Moreover, it cannot be maintained that whatever defamation may have resulted was privileged as an official action.

For, as we have shown, the Loyalty Review Board was wholly without authority to render any opinion in this case and did so arbitrarily after denying the fair hearing required by the Executive Order. The situation is thus squarely within the pronouncement in *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341, U.S. 123, at p. 139-140:

> "When the acts of the * * * Loyalty Review Board are stripped of the Presidential authorization claimed for them * * *, they stand, * * * as unauthorized publications of admittedly unfounded designations of the [plaintiff] * * * their effect is to cripple the functioning and damage the reputation of [plaintiff] in their respective communities and in the nation. The complaints, on that basis, sufficiently charge that such acts violate * * * [plaintiff's] common law right to be free from defamation. 'A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter kind persons from associating or dealing with him." Restatement, Torts, § 559.
>
> "These complaints do not raise the question of the personal liability of public officials for money damages caused by their ultra vires acts. * * * They ask only for declaratory and injunctive relief * * * as far as practicable, correcting the public records."

This is precisely the second category of relief sought by plaintiff in paragraphs 2, 3, and 5 of Part I of the prayer for relief. Consequently, this relief should be granted to plaintiff without regard to the validity or invalidity of his discharge from his employment as a Foreign Service Officer.

## CONCLUSION

For the reasons advanced above, plaintiff's separation from the Foreign Service of the United States in violation of the express provisions of the Foreign Service Act of 1946 was not authorized either by Executive Order No.

9835, as amended, or by the McCarran Rider. Accordingly, plaintiff's restoration to his position must be ordered.

Apart from the foregoing relief, the public records concerning plaintiff should be corrected, as prayed in the Complaint, so as to expunge therefrom the material which unjustifiably defames his character to his continuing great and irreparable injury.

Respectfully submitted,

C. E. RHETTS,
*Attorney for Plaintiff.*

REILLY, RHETTS & RUCKELSHAUS,
1401 K Street, N. W.
Washington 5, D. C.
*Of Counsel.*

17959

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957

No. 578

CORNELL JOEL GROSSMAN, D.D.S., *Petitioner,*

v.

UNITED STATES OF AMERICA, UNITED STATES ATOMIC ENERGY COMMISSION, *Respondents.*

**An Appeal From Determination of the United States Court of Appeals, for the District of Columbia Circuit**

## PETITION FOR REHEARING BASED ON THE NEW DECISION OF THE UNITED STATES PATENT OFFICE AND THE NEW ORDER OF THE UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT

CORNELL JOEL GROSSMAN, D.D.S.
46 Old Short Hills Road
Millburn, New Jersey
*Pro Se.*

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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---

**An Appeal From Determination of the United States Court of Appeals, for the District of Columbia Circuit**

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AS THE INVENTOR WHO FIRST GAVE THE ATOMIC HYDROGEN BOMB FORMULAS TO THE UNITED STATES, PETITIONER PRAYS THAT THE SUPREME COURT REMAND THIS CASE TO THE UNITED STATES ATOMIC ENERGY COMMISSION FOR JUST COMPENSATION AND RECOGNITION.

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## PETITION FOR REHEARING BASED ON THE NEW DECISION OF THE UNITED STATES PATENT OFFICE AND THE NEW ORDER OF THE UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT

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The Government of the United States has presented to the Appellant substantial grounds that this Court should grant a hearing and not dismiss this case.

The Government of the United States through its most scientific and most reliable Patent Office of the United States has rendered a decision that the formula of Cornell Joel Grossman is an atomic military weapon.

This admission on the part of the Government was not heretofore available to the court or to the Appellant.

This admission nullifies the decision of the United States Atomic Energy Commission that appellant's formula was not atomic and not in the domain of the United States Atomic Energy Commission.

On January 9, 1958, The United States Patent Office rendered a decision that the formulae of Dr. Cornell Joel Grossman is an Atomic Military Weapon, and therefore in the domain of the United States Atomic Energy Commission.

In this response the Patent Office states:

> "Claims 1 to 20 are further rejected for containing subject matter barred by the Atomic Energy Act of 1954 as stated in 42 U.S.C. 2181 (Sec. 151)."

These words comprise the last paragraph of Page 3, in Paper 2, response of the United States Patent Office, to Applicant Cornell Joel Grossman, in Patent Application Number 632,001, filed January 2, 1957.

This Patent Application is titled:

> "New Chemical Combination, or Composition Useful as a Military Weapon, Bomb, Explosive for Peaceful Use, Poison Gas, Fuel, Propellant, or Source of Atomic Power."

This Patent Application is substantially the same as the Atomic Hydrogen Bombs of the United States made from appellant's formulae, in this case, and therefore it is fitting for this Court to grant this petition.

The following is a quotation from Public Law 703—Aug. 30, 1954, 68 Stat., page 943:

Report of Invention to Commission.

"CHAPTER 13. PATENTS AND INVENTIONS

"SEC. 151. MILITARY UTILIZATION.—

"a. No patent shall hereafter be granted for any invention or discovery which is useful solely in the utilization of special nuclear material or atomic energy in an atomic weapon. Any patent granted for any such invention or discovery is hereby revoked, and just compensation shall be made therefor.

"b. No patent hereafter granted shall confer any rights with respect to any invention or discovery to the extent that such invention or discovery is used in the utilization of special nuclear material or atomic energy in atomic weapons. Any rights conferred by any patent heretofore granted for any invention or discovery are hereby revoked to the extent that such invention or discovery is so used, and just compensation shall be made therefor.

"c. Any person who has made or hereafter makes any invention or discovery useful (1) in the production or utilization of special nuclear material or atomic energy; (2) in the utilization of special nuclear material in an atomic weapon; or (3) in the utilization of atomic energy in an atomic weapon, shall file with the Commission a report containing a complete description thereof unless such invention or discovery is described in an application for a patent filed with the Commissioner of

Patents by such person within the time required for the filing of such report. The report covering any such invention or discovery shall be filed on or before whichever of the following is the later: either the ninetieth day after completion of such invention or discovery; or the ninetieth day after such person first discovers or first has reason to believe that such invention or discovery is useful in such production or utilization.

"d. The Commissioner of Patents shall notify the Commission of all applications for patents heretofore or hereafter filed which, in his opinion, disclose inventions or discoveries required to be reported under subsection 151 c., and shall provide the Commission access to all such applications."

The following is a copy of an Order of a Court that has had, or that has, jurisdiction in this case:

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,959

CORNELL JOEL GROSSMAN, D. D. S., *Petitioner,*

v.

UNITED STATES OF AMERICA,
UNITED STATES ATOMIC ENERGY COMMISSION,
*Respondents.*

Before: Edgerton, Chief Judge, Wilbur K. Miller and Danaher, Circuit Judges, in Chambers.

ORDER

It appearing that on November 1, 1957, petitioner filed with this Court a reply to the order entered herein October 25, 1957, and in said reply showed that he had complied with Rule 13 of the Supreme Court of the United States, it is

ORDERED by the Court that respondents' motion to dismiss petitioner's appeal to the Supreme Court of the United States be, and it is hereby denied.

PER CURIAM.

Dated: January 6, 1958

This order was received by the Appellant after the Supreme Court decision was made. It is therefore a new reason for the Supreme Court to grant a rehearing of this case.

CORNELL JOEL GROSSMAN, D.D.S.
46 Old Short Hills Road
Millburn, New Jersey
*Pro Se.*

I, Cornell Joel Grossman, Appellant herein, hereby certify that the foregoing petition for a rehearing is presented to the Supreme Court of the United States, in good faith and not for delay.

It is within the discretion of the Court to decide whether or not it wishes a writ of certiorari in view of the decision of the United States Patent Office, that the Appellant's subject is Atomic Energy Matter and therefore shall not be made public by letters patent and shall be subject to Section 151 of the United States Atomic Energy Act.

This petition is restricted to the grounds above specified and to the decision of the United States Court of Appeals.

Both of these substantial decisions were only available to the Appellant after the Supreme Court of the United States made its dismissal order.

(Signed) Cornell Joel Grossman
Address 46 Old Short Hills Road
Millburn, New Jersey.

Subscribed and sworn to before
me this 17th day of Jan., 1958.

Mark T. Oliver

Notary Public of New Jersey
My Commission Expires Feb. 7, 1960

I, Cornell Joel Grossman, Appellant herein, hereby certify that on the 21st day of January, 1958, I served copies of the foregoing PETITION FOR REHEARING BASED ON THE NEW DECISION OF THE UNITED STATES PATENT OFFICE AND THE NEW ORDER OF THE UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT, to the Supreme Court of the United States on the several parties thereto, as follows:

1. On the United States, by mailing a copy thereof to the office of William W. Fleming, Attorney, Department of Justice, Washington, D. C., attorney for the United States in this action.

And by mailing a copy in a duly addressed envelope with postage prepaid to the Solicitor General, Department of Justice, Washington 25, D.C.

2. On the Clerk of the Court, United States Supreme Court, District of Columbia Circuit, Washington, D.C. by mailing a copy, postage prepaid.

(Signed) CORNELL JOEL GROSSMAN
Address 46 Old Short Hills Road
Millburn, New Jersey.

Notary Public of New Jersey

Subscribed and sworn to before
me this 17th day of Jan., 1958.

MARK T. OLIVER

Notary Public of New Jersey
My Commission Expires Feb. 7, 1960